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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1085

IKE DOVBERG and MAURICE DOVBERG, Individually and t/a PASTE COMPANY OF AMERICA,
Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners, Ike Dovberg and Maurice Dovberg, individually and trading as Paste Company of America, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit

affirming the entry of judgment for the defendants notwithstanding a jury verdict for the plaintiffs in this civil antitrust suit.

OPINIONS BELOW

The opinions of the Court of Appeals -- consisting of a Majority Opinion written by Circuit Judge J. Cullen Ganey and concurred in by four other judges and a Dissenting Opinion written by Chief Judge Harry E. Kalodner and concurred in by former Chief Judge John Biggs and Judge Austin L. Staley -- are included in the Appendix to this Petition (App. 2a-35a). The opinions are also reported in 353 F.2d 963.

JURISDICTION

The judgment of the Court of Appeals (App. 26a) was entered on December 3, 1965. The jurisdiction of this

Court is invoked under 28 U.S.C. §1254 (1). The jurisdiction of the trial court was based on the Clayton Act, c. 323, §4, 38 Stat. 731, 15 U.S.C. §15.

QUESTIONS PRESENTED

1. Where a jury, after a four month trial, has returned a verdict for the plaintiffs based upon a finding of conspiracy in violation of the Sherman Act, may that verdict be set aside and judgment entered for the defendants notwithstanding the jury's verdict:

(a) By a trial judge who, after recessing the case for one week to consider the plaintiffs' evidence, of which there was a daily transcript, denied the defendants' Motions for a Directed Verdict in a 75-page Memorandum in which he exhaustively reviewed the

plaintiffs' evidence and concluded that it was sufficient "to raise a substantial issue of fact as to the truth of" plaintiffs' complaint?

(b) By a trial judge who, at the close of all the evidence, has submitted the case to the jury on the basis of a 39-page Charge, to which the defendants took no material exception, in which Charge the judge stated that, on the basis of the evidence, the issue of conspiracy was for the jury to decide?

(c) By a trial judge who, after the jury's verdict, files only a brief "Order and Direction for Judgment" in which he concludes, without citation of pertinent legal authority, that there was "a total failure and lack of evidence to prove the essential elements of conspiracy"?

(d) By a Court of Appeals which, with a dissent joined in by the past and present Chief Judges (who also constituted two of the three judges who heard argument initially and read the entire record), affirms the entry of judgment N.O.V., but on a ground entirely different from that on which the trial judge rested in entering judgment, which basis involves a purely factual determination by the Court of Appeals in conflict with the jury's finding and the evidence which supported that jury finding?

2. Whether the Sherman Act applies to dealings between relatively small businesses in the stream of interstate commerce, or whether evidence which would justify a finding of conspiracy if the defendants were large businesses is

to be viewed in a different light where all of the businesses are small?

STATUTE INVOLVED

Section 1 of the Sherman Act, c.647, 26 Stat. 209, 15 U.S.C. §1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

STATEMENT OF THE CASE

1. The Parties. From 1950 until 1957, in a factory in Philadelphia which they owned and had equipped for manufacturing their products, petitioners, Ike Dovberg and Maurice Dovberg, father and son, trading as Paste Company of America, purchased raw materials in the stream of interstate commerce, manufactured their products from these materials, and sold

those products in Philadelphia and also, through a national distributor, elsewhere in the eastern United States. Petitioners' principal product was their wall size eliminator, a product known as Nix-Size.[1] Petitioners also manufactured and sold a wet wallpaper paste and a cellulose base wallpaper paste.

Pennsylvania Paste Company ("Papco"), -- one of the respondents here -- is a Pennsylvania corporation which, at the time in issue and for many years before then, leased a factory building in Philadelphia and there manufactured wet wallpaper paste and related products which

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1. A wall size eliminator is a product which, when added to a conventional wallpaper paste, renders a separate sizing operation unnecessary.

were sold to retailers in Philadelphia and in states adjacent to it. Papco's plant was approximately the size of the petitioners' plant, and its annual business approximated $150,000.

Samuel Schultz & Company -- whose partners constitute the other respondents -- is a partnership consisting of Samuel Schultz, his wife, and their two sons-in-law. The Schultz firm is the largest retailer of wallpaper and paints in the Philadelphia area, where it operates approximately seven stores.

2. Procedural History. Petitioners' Complaint, as amended, named as defendants Papco, the Schultz firm, seven other retail firms which at one time sold petitioners' products in Philadelphia and Camden, New Jersey, and Dow Chemical Company, supplier of the principal ingredients of petitioners' cellulose-base

wallpaper paste. However, prior to trial, petitioners voluntarily eliminated five of the eight retailer defendants, and at the trial petitioners elected to present no evidence against a sixth retailer whose original counsel became ill on the eve of trial.

Shortly before trial, all of the then defendants filed Motions for Summary Judgment. These Motions were denied by Judge Paul Leahy with an Opinion (195 F.Supp. 337).

Trial -- before Judge Leahy and a jury -- began on November 28, 1961 and concluded on March 29, 1962. It was the longest trial in the history of the Eastern District of Pennsylvania. The defendants against whom petitioners presented evidence were Papco, Dow, Schultz and another Philadelphia retailer of wallpaper products, Atlas.

First of all, petitioners charged Papco with attempting to monopolize; more specifically, petitioners charged that from 1950 through 1957, Papco engaged in a continuous campaign -- which was ultimately successful -- to destroy their business. At trial, petitioners showed that Papco's principal -- and most profitable -- product was wet wallpaper paste; that Papco supplied about 50% of that product in the Philadelphia market, but that there was a declining market for the product. Petitioners also showed that, in the latter part of 1950, after petitioners began manufacturing wet wallpaper paste, Flanagan, the proprietor of Papco, told Maurice Dovberg that Papco was going to put petitioners out of business because they were manufacturing wet paste. Petitioners also showed that Papco then mounted

not only a direct attack on their sales of wet paste -- characterized by stealing petitioners' expensive, returnable wet paste containers, imitation of petitioners' wet paste package, and a price cut on wet paste -- but that Papco also mounted an indirect attack against petitioners. The indirect attack consisted of Papco's manufacturing and selling below cost a wall-size eliminator known as Liqui-Size which, in form, composition and packaging, was a conscious, but inferior, imitation of petitioners' principal product, the wall-size eliminator known as Nix-Size (App.21a-26a,61a-75a).

Second, petitioners charged Papco with conspiring to restrain interstate commerce by inviting petitioners' customers to cut off their purchases of Nix-Size, purchase Papco's cheaper imitation instead, and market it to the

public as petitioners' product or the same thing as petitioners' product. The retailer defendants, including Schultz, were charged with conspiring with Papco by accepting its invitation with knowledge of why it was being tendered and discontinuing their purchases of Nix-Size, purchasing Liqui-Size instead, and selling it to the public as Nix-Size under a private label or "the same thing as" Nix-Size (App.65-a78a,81a-82a).

Petitioners charged that Dow, which owned patents covering some uses of two of the principal ingredients of petitioners' patented cellulose base wallpaper paste and believed that it was not in Dow's interest to have petitioners in a position to enforce patents covering this new use of these products, knowingly cooperated and thereby conspired with Papco's effort to drive petitioners

out of business by supplying petitioners' competitors in the manufacture of cellulose base paste with a cheaper cellulose base which was not made available to petitioners and selling that product to the competitors at prices which were lower and on credit terms which were superior to those which Dow offered petitioners (App. 38a-43a).

At the conclusion of the petitioners' evidence, all defendants moved for directed verdicts of dismissal. The trial judge recessed proceedings for one week and then filed a 75-page Memorandum (App. 37a-109a) in which he denied the defendants' Motions. In this Memorandum, annotated to the daily transcript of the petitioners' evidence made in the course of the trial, the trial judge noted that petitioners' evidence as to Dow was "thin" (App. 103a) and that

their evidence with respect to Atlas was "weak" (App. 93a). However, as was pointed out later in the Dissenting Opinion in the Court of Appeals (App. 32a-35a), the trial judge expressly found that there was evidence sufficient to sustain a jury finding against Papco and Schultz. The conclusions in the trial judge's Memorandum which the dissenting judges in the Court of Appeals regarded as having particular significance (App. 18a-19a, 32a-33a) were these:

> "While the great bulk of it [plaintiffs' testimony] was hearsay, there does appear to be a modicum of direct testimony admitted to raise a substantial issue of fact as to the truth of the allegation . . . . Pennsylvania Paste's motion is denied. A sufficient quantum of evidence has been adduced by plaintiffs to allow the case against this defendant to go to the jury. Evidence has been adduced, for example, as to alleged

statements of Mr. Flanagan, of Pennsylvania Paste's intent to force plaintiffs out of business; of Pennsylvania Paste placing on the market Liqui-Size with the intent to force plaintiffs out of business; of Pennsylvania Paste's costs being the same or higher than those of plaintiffs; of Pennsylvania Paste selling its product for prices below cost; of Pennsylvania Paste taking butter tubs belonging to plaintiffs. In short, sufficient factual questions have been presented by plaintiffs to allow the jury to rule on the issues."[2]

* * * * * * *

"'Schultz is charged with "discontinuing and refusing to resume . . . [his] purchases of wall size eliminator" from plaintiffs, "with knowledge of Pennsylvania Paste's intent" to drive the plaintiffs out of business.

"'Evidence has been introduced of Schultz'

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2. The emphasis is that supplied by the dissenting judges in the Court of Appeals.

> discontinuance of purchases from plaintiffs and his refusal to resume purchases. Evidence has also been introduced to the effect that plaintiff Dovberg told Schultz of Pennsylvania's alleged intent and that Schultz was aware of it . . .
>
> "'Plaintiffs charge that "at the instigation of Pennsylvania Paste . . . [Schultz] sold the wall size eliminator . . . purchased from Pennsylvania Paste as being, or being the same thing as Nix-Size". Substantial evidence has been introduced to this effect.'"

After their Motions for Directed Verdict were denied, the defendants presented extensive evidence and, at the conclusion of all the evidence, counsel spent five days addressing the jury, to whom the issues were then submitted in a Charge (App.110a) which the trial judge gave to counsel in

advance,[3] inviting their suggestions.

The jury deliberated for approximately 24 hours before returning their verdict. On the conspiracy charge, the jury returned a $22,000 verdict against Papco and Schultz. But they found that the second retailer, Atlas, and the chemical company, Dow, were not liable. The jury also concluded that Papco was not liable on the charge of monopoly.

The verdict for petitioners was trebled, and judgment was entered on it. Papco and Schultz filed post-trial motions, and on November 7, 1962, the trial judge filed a brief Order and Direction for Judgment. He stated that "***all and every item

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3. As submitted to counsel, the Charge was annotated with case authorities to support each principle of law which it enuniciated. There were no substantial exceptions taken to the Charge by the parties.

of alleged error has been critically analyzed and evaluated and *** the Court concludes there was no prejudicial error in the admission of testimony, rejection of testimony, or manner of the submission of the issues to the Jury, or in the Charge to the Court, when taken in full context, for it was an accurate presentation of the law."

Then, without detailed discussion of evidence or citation of pertinent legal authority, the trial judge concluded (App.17a) that there had been a "total failure and lack of evidence to prove the essential elements***relating to guilt of Samuel Schultz & Co." Accordingly, both defendants were held to be entitled to judgment, since Papco could not conspire with itself.

Also, said the trial judge (App. 17a), the verdict was against the

the weight of the evidence because Maurice Dovberg's testimony "ranged from***deliberate obfuscation to***deliberate fabrication,***and from fantasy to the bizarre." Therefore if his entry of judgment N.O.V. were reversed, the trial judge awarded the defendants a new trial.

Petitioners' appeal to the Court of Appeals questioned the propriety of entering judgment N.O.V. or awarding a new trial, but since that Court ultimately passed only on the entry of judgment N.O.V we are not in a position to ask this Court to review the alternative award of a new trial at this time. However, the Court should know that the sole basis assigned for the award of a new trial was the trial judge's stated disbelief of the testimony of Maurice Dovberg.

Dovberg was on the witness stand on 35 trial days and his testimony covered more than 4300 pages of daily transcript (App. 21a) which was used as a basis for cross examination and jury argument by the four defense counsel. At no time during the four-month trial, either in the presence of the jury or outside the presence of the jury, had the trial judge stated, or even implied, that in his opinion Maurice Dovberg's credibility was such that the jury had no right to believe him. Furthermore, the only references to the record which the trial judge cited to support his own rejection of Dovberg's testimony were to four excerpts from Dovberg's testimony, none of which dealt with a material issue, none of which established that Dovberg told a material falsehood to the jury, and which represented testimony

which Dovberg gave on the 19th, 24th, 25th and 33rd days he was on the stand.

Petitioners' appeal was argued originally on September 26, 1963 before a panel consisting of the then Chief Judge of the Court of Appeals, John Biggs, the present Chief Judge of that Court, Harry E. Kalodner, and Judge J. Cullen Ganey. At the conclusion of the argument, Judge Biggs stated that each member of the panel would review the entire record before the case was decided. Two of the three judges on the panel ultimately voted to reverse the entry of judgment N.O.V.

However, on October 7, 1965, two years after the initial argument, the case was reargued before the full Court of eight judges on the Court's own motion. On December 3, 1965, less than

two months after the reargument, Judge Ganey, supported by four other judges, filed his Opinion (App. 2a) sustaining the entry of judgment N.O.V., and Chief Judge Kalodner, joined by former Chief Judge Biggs and Circuit Judge Staley, filed his Dissenting Opinion (App.15a).

As the dissenters pointed out (App. 31a), the trial judge, in entering judgment N.O.V., did not conclude that the evidence was not sufficient to sustain the jury's implicit finding that Papco acted to destroy petitioners' business. Neither did the majority in the Court of Appeals question that finding. Both the trial court and the majority in the Court of Appeals bottomed their decisions on conclusions that the evidence was insufficient to support the jury's finding that Schultz conspired with Papco against petitioners. To

justify this conclusion, the majority of the Court of Appeals made no reference whatever to the reasons which the trial judge had cited to support his conclusion. Instead, the majority of the Court of Appeals affirmed on the basis of reasoning entirely at variance with that of the trial judge and on a theory which had not even been advanced in the brief filed in that court on behalf of Schultz.

3. The Basis for the Jury's Verdict. Petitioners' evidence against all defendants is outlined in the trial judge's Memorandum denying the defendants Motions for Directed Verdict (App. 37a) and summarized substantially in the Dissenting Opinion in the Court of Appeals (App. 15a). In view of the issue presented by this Petition, it is sufficient

to note that the following evidence, under well settled principles, justified the trial judge's submission of the issue of a conspiracy between Papco and Schultz to the jury and upholds the jury's finding of conspiracy.

The trial judge charged as follows (App. 120a):[4]

> "***Express agreement is not required between conspirators. It is enough that uniformity of action is contemplated by the defendants and that the defendants conformed to the arrangement. If any party understands that another wants him to pursue a particular business policy, the effect of which in view of the policies adopted by the other will be an unreasonable restraint of trade, and if he adopts that policy, knowing it will result in an unreasonable restraint of trade, and it does

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4. Footnotes 5-9 are those with which the trial judge annotated the draft of his Charge which he submitted to counsel in the course of the trial.

result in such restraint of trade, then he and his associate or associates are guilty of conspiracy in violation of the Anti-Trust Laws.[5]

"Neither formal agreement nor direct communication is required among conspirators. Conspiracy may be found in a course of dealing or other circumstances, as well as in an exchange of words. It can be proved by circumstantial evidence, evidence which without going directly to prove the existence of an asserted fact gives rise to a logical inference that such asserted fact does in fact exist. But before a conspiracy can be said to have been proved by such circumstantial or inferential evidence alone, it is necessary not only that the circumstances proven by the evidence shall reasonably give rise to an inference of conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from the

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5. UNITED STATES v. MASONITE CORP., 316 U.S. 265, 275 (1945); WILLIAM GOLDMAN THEATRES, INC. v. LOEW'S, INC., 3 Cir., 150 F.2d 738, 743-744 (1946)

circumstances proved by the evidence, one consistent with the evidence of a conspiracy and the other inconsistent, you should not infer the existence of conspiracy from such evidence alone."[6]

The court further charged, again without exception by counsel (App. 125a):

"A conspiracy may be inferred***if on the basis of all the evidence submitted***, you conclude that the action of the retailer defendants***in allegedly refusing to deal with the plaintiffs, or in dealing with plaintiffs in the allegedly discriminatory manner alleged by plaintiffs was not a matter of sheer coincidence.[7] Evidence tending to show that there was a legitimate business reason for the act of defendant retailers***in allegedly refusing to deal with plaintiffs, or in dealing with the plaintiffs in the allegedly discriminatory manner alleged,

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6. AMERICAN TOBACCO CO. v. UNITED STATES 328 U.S. 781, 809-810 (1946).
7. WILLIAM GOLDMAN THEATRES v. LOEW'S, INC., 3 Cir., 150 F.2d 738, 743 (1946)

> is admissible to refute the conspiracy based on circumstantial evidence; but if the overall evidence is sufficient to support an inference that the defendants entered into a conspiracy with Pennsylvania Paste Company, the fact that a defendant's individual refusal to deal, or apparently discriminatory dealing, may be explainable as a reasonable business decision will not of itself justify his conduct or deprive it of its illegal character.***"8

With this statement of the law in mind, we shall discuss the evidence.

The evidence as to Papco (App. 68a-78a) justified the jury in concluding that, throughout the period in controversy, pursuant to an announced intention to destroy petitioners' business, Papco marketed, at less than cost, a cheaper, less effective imitation of Nix-Size in a deceptively similar pint package and encouraged retailers to

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8. Steel, J., Charge to Jury (Tr. 3771) DELAWARE VALLEY MARINE SUPPLY CO. v. AMERICAN TOBACCO CO., 184 F.Supp. 440, aff'd. 297 F.2d 199 (1961).

purchase this product instead of Nix-Size and to sell it to the public as Nix-Size or as the same thing as Nix-Size. In other words, there was evidence from which the jury could conclude that, throughout the period of controversy, Papco invited retailers "to pursue a particular business policy, the effect of which, in view of the policies adopted by" Papco, was "an unreasonable restraint of trade" -- the destruction of petitioners' business.

The evidence showed that Papco had been carrying on this campaign against petitioners for eighteen months on March 14, 1952, when the Schultz firm stopped purchasing Nix-Size and commenced purchasing Papco's Liqui-Size. Indeed, the evidence (App. 74a,

86a-89a)[9] shows that Schultz joined Papco at the very time the Papco campaign became most effective, i.e., when Papco chose to change the packaging of Liqui-Size so that the package was identical, except for the label, with the packaging of Nix-Size.

There was evidence (App. 83a-86a)[9] that, in the year preceding Schultz's switch to Papco, Samuel Schultz had become disenchanted and angry with petitioners because they had objected to the Schultz firm's cutting the retail price of Nix-Size and to the Schultz firm's unlicensed repackaging

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9. These references are to the summary of the evidence in the Dissenting Opinion in the Court of Appeals. References to the original record are found in petitioners' original brief in the Court of Appeals at pp. 16-19.

of Nix-Size for resale to the public under a private label and at a cut-rate price.

There was evidence[10] that, while Papco's product was one of several similar products available to Schultz -- some of them nationally advertised and some of them also available under private labels -- when the Schultz firm chose to discontinue purchasing Nix-Size, they elected then to purchase Liqui-Size, the only product which, to their knowledge, was then being marketed solely to hurt petitioners.

There was evidence (App. 86a-87a) that Samuel Schultz was aware

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10. See Petitioners' original brief in Court of Appeals, p. 19.

that Papco was "gunning" for petitioners in November, 1951 and that he was specifically advised by Maurice Dovberg on March 13, 1952 that Liqui-Size was being offered to him at cut-rate prices in an effort to put petitioners out of business, and that if Schultz did anything to assist Papco in that effort, petitioners would hold the Schultz firm equally responsible with Papco.

There was evidence (N.T. 303, 933-940, 2491, 2582, 4040, 4062) that the Schultz firm, like Papco and other retailers to whom Papco sold Liqui-Size, blatantly represented the product as being Nix-Size, or being the same thing as Nix-Size, when it was resold to the public, but that this practice was not characteristic of those who marketed

other products which competed with Nix-Size.

In DELAWARE VALLEY MARINE SUPPLY COMPANY v. AMERICAN TOBACCO COMPANY, 297 F.2d 199 (1961), Cert. den., 369 U.S. 839 (1962), the Court of Appeals for the Third Circuit noted (297 F.2d 206):

> "***Many of the decisions in which courts find conspiracy on the basis of circumstantial evidence do so because the defendants acted in apparent contradiction of their own economic self-interest.***"

See also, in accord, BORDONARO BROS. THEATRES v. PARAMOUNT PICTURES, 176 F.2d 594 (2nd Cir., 1949).

The evidence in the present case showed that, even though Liqui-Size was not as effective as Nix-Size and did not sell as well nor produce as large a mark-up per item as Nix-Size when Schultz sold it to the public, the Schultz firm,

after March 14, 1962, continued to purchase and resell Liqui-Size exclusively and continued to refuse to deal with petitioners (App. 28a, 89a-90a).

The trial judge, without exception from the defense, charged the jury (App. 124a):

> "You should consider all the reasons parties in this suit have given for their acts. If they seem to you to be honest ones, advanced in good faith, you should take that into account in determining what happened. If they seem dishonest, hastily made, advanced in bad faith, you would [sic] take that into account."

At trial, the Schultz firm's evidence was that they discontinued purchases of petitioners' wet paste because of customer complaints about the "very strong odor of oil of wintergreen" (Spiro Tr. Mar. 5, p. B-22)[11]; but at a

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11. The references in this paragraph and the next are to the original transcript of the evidence.

discovery deposition given by Samuel Schultz (Spiro Tr. Mar. 5, p. B-72), Samuel Schultz could not even recall purchasing petitioners' wet paste (Schultz Tr. Mar. 8, pp. E-43-45).

Two of the reasons which the Schultz firm assigned at trial for their refusal to deal further with petitioners were the tone of a letter (Exhibit P-106) which they received from petitioners dated March 13, 1952, and petitioners' refusal to lower the price of Nix-Size then (Spiro Tr. Mar. 5, B-57-58). However, the letter referred to a conversation in which Schultz had already informed Dovberg of Schultz's decision to discontinue Nix-Size purchases. Furthermore, in discovery, Samuel Schultz, testifying in the presence of Spiro, had not even mentioned price as a consideration which led his firm to discontinue

purchases of Nix-Size, and he could not even recall receiving the allegedly offensive letter (Schultz Tr. Mar. 8, pp. E-54-59).

Accordingly, the jury had the right under the Charge to infer that an improper goal actually motivated the Schultz firm in discontinuing all business with petitioners, because the reasons to which the Schultz partners testified were "dishonest, hastily made, advanced in bad faith."

4. The Courts' Stated Reasons for Entering Judgment N.O.V.

(a) Failure to Prove Motive.

In ignoring the controlling authorities and reversing his own carefully considered and well documented original conclusions that petitioners had presented a case for the jury as to

Papco and Schultz, the trial judge assigned as one of his two reasons the alleged fact that (App.17a), "No evidence has been adduced indicating any plausible or rational motive for" the Schultz firm to conspire to force petitioners out of business.

The trial judge cited no case authority to justify the entry of judgment on this basis, because no such authority exists. It has long been established that the "***motives and intentions, except as declared, or appearing from the character of the act, are too vague and difficult of ascertainment to be made the basis of the legal judgment called for in such cases.***" UNITED STATES v. MOTION PICTURE PATENTS CO., 225 Fed. 800, 806 (E.D. Pa. 1915). See, also, AMERICAN BISCUIT MANUFACTURING

CO. v. KLOTZ, 44 Fed. 721 (E.D.La.,1891); WIGMORE ON EVIDENCE (3rd Ed. 1940) §118, pp. 558-559.

(b) Failure to Relate Knowledge to Actions. The second reason assigned by the trial judge for entering judgment for the defendants was (App. 17a):

> "All testimony concerning acts of Samuel Schultz & Co. for 1952-56 period indicates it did nothing more than purchase wall size eliminator from Pennsylvania Paste and end purchases from plaintiffs, and ***All testimony of alleged sales of Pennsylvania Paste manufactured wall size eliminator 'as being or being the same thing as' plaintiffs' Nix-Size relates to acts in 1956 and 1958***."

Even the able and experienced counsel for the Schultz firm had made no such argument in the brief submitted to the judge in support of Schultz's

Motion for Judgment N.O.V., and the argument has no validity.

Apart from the evidence of "passing off" of which Schultz was shown, by six witnesses, to have been guilty in 1956 through 1958, petitioners proved that, subsequent to March of 1952, the Schultz firm, reacting to petitioners' complaints concerning its price cutting and unauthorized repackaging and relabelling of Nix-Size, joined many other Philadelphia retailers in refusing to purchase petitioners' superior wall size eliminator; purchased Papco's inferior product; marketed it in a package very similar to that of the petitioners' (and to that of no other competitor); persisted in its refusal to deal with petitioners even when to do so would have accorded with Schultz's economic interests,

and did all of this with knowledge that the product which Schultz was purchasing and reselling was being marketed in this way by the manufacturer solely to destroy petitioners' business. From this evidence alone, under the Charge of the Court and the authorities cited, supra, (at pages 24-27) the jury could properly have found that the Schultz firm conspired. Accordingly, the fact that petitioners did not affirmatively prove in addition that the Schultz firm also sold Liqui-Size as Nix-Size, or the same thing as Nix-Size, before 1956 in no way entitled defendants to judgment. As this Court noted in NYE & NISSEN v. UNITED STATES, 336 U.S. 613, 617 (1949):

> "***The fact that certain types of***practices occurred during one period and other types at different periods is without significance.***There

was an abundance of evidence, ***from which the jury could conclude that there was one continuous and persistent conspiracy***."

(c) Schultz did not Participate in the Conspiracy to Prevent Petitioners from Manufacturing Wet Paste. As we have noted before, the majority in the Court of Appeals made no effort to justify the entry of judgment N.O.V. on either of the grounds which the trial judge assigned for his action. Instead, the Court of Appeals followed a different tack. Broadly stated, its reasoning was as follows:

(i) Petitioners charged Papco with having conspired with other defendants to destroy petitioners' business and thereby preserve Papco's dominant position in the wet paste manufacturing business in the Philadelphia

area (App. 5a).

(ii) Petitioners admitted that Papco had forced them out of the wet paste business in January, 1951; that thereafter petitioners made wet paste only on rare occasions and for a few special customers (App. 9a).

(iii) Schultz did not stop purchasing petitioners' products and commence purchasing those of Papco until March 14, 1952 (App. 12a).

(iv) Therefore, "a critical examination of this record shows, neither directly nor by circumstantial evidence, any conspiratorial conduct on the part of Schultz with the Pennsylvania Paste Company to drive the plaintiffs, Dovberg, out of business, in order to preserve Pennsylvania Paste Company's dominant position in the wet paste industry" (App. 14a).

Not only was this reasoning not the basis on which the trial court entered judgment, but such reasoning was not advanced in the Schultz brief on appeal. The reasoning is fallacious for several reasons.

The sequence of events establishes that Papco did not initiate any campaign against petitioners until the late summer and early fall of 1950 when petitioners, who had been manufacturing Nix-Size since 1948 without competition from Papco, commenced manufacturing and selling substantial quantities of wet paste, which was Papco's principal and most profitable product. It was at this time that Flanagan of Papco told Dovberg that, because petitioners were manufacturing wet paste, Papco would "reduplicate and manufacture any product that we make as our product, ***outproduce, undersell***suffer losses

until such time as [Papco] would put petitioners out of business." (App. 65a).

The evidence also shows that, after making this threat, Papco mounted a two pronged attack on petitioners. The direct attack consisted of stealing petitioners' returnable wet paste containers, imitating petitioners' new wet paste package, and selling paste in that package at cut prices. The second prong of the attack consisted of marketing Liqui-Size, a cheaper, less effective imitation of Nix-Size, selling it to retailers below the cost of manufacture, and encouraging the retailers to stop purchasing Nix-Size, purchase Liqui-Size instead, and sell it to the public as being Nix-Size under a private label or the same thing as Nix-Size (App. 63a-68a).

The evidence also shows that, while Papco was able to abandon the first prong of its attack when petitioners discontinued large scale sales of wet paste in the spring of 1951, Papco continued to press its indirect attack -- through the marketing of Liqui-Size -- as long as petitioners remained in business. Since this campaign entailed Papco's selling Liqui-Size at a loss and Papco was primarily a paste manufacturer, the jury had the right to find that the campaign was pressed because petitioners continued to manufacture some wet paste, continued to advertise the product,[12]

12. The majority of the Court of Appeals makes no allusion to this fact, which is emphasized in the Dissenting Opinion (App. 24a). Maurice Dovberg did testify that Papco's tactics forced petitioners to discontinue large scale marketing of wet paste in 1951; however, he also stated that petitioners continued to supply the product to special customers thereafter (N.T. 2427-
(Footnote continued)

and retained the same ability to manufacture the product that they possessed initially. This same campaign was continuing in March, 1952 -- was, indeed, intensified when Schultz chose to join it, and since there was evidence from which the jury had the right to infer that Schultz acted knowingly and with malice toward petitioners, the verdict

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12. (Footnote continued)
2432) and continued to advertise the product (N.T. 3004-3005). There are 36 exhibits which originated subsequent to Schultz's switch to Papco which include such advertisements. Of these, the most significant is Exhibit D-236, an invoice dated March 14, 1952, which petitioners submitted to the Schultz firm, and which the Schultz firm paid the day after the parties discussed Schultz's plan to switch from Nix-Size to Liqui-Size; in the upper portion, this invoice notes that petitioners manufacture wet and dry paste; in the lower portion of the invoice, the products advertised include: "Wet Paste: 8½ Gallon Drums, 4 Gallon Drums, Waterproof Cartons."

was proper under the evidence and the charge of the Court.

It is true that Schultz did not act as it did primarily to help Papco dominate the wet paste business. However, it is not necessary for each party to a conspiracy to have the same motive for accomplishing the objective of the conspiracy, as long as that object -- in this instance the destruction of a business -- is the same. See CAPE COD FOOD PRODUCTS v. NATIONAL CRANBERRY ASS'N., 119 F. Supp. 900 (D. Mass., 1954), a decision of Judge Charles Wyzanski discussed on pages 21-22 of our original brief in the Court of Appeals.

Accordingly, if Papco was carrying out a campaign to destroy petitioners' business in order to preserve Papco's dominant position in the wet paste industry in the Philadelphia area, the

jury had the right to find that Schultz became party to a conspiracy with Papco by knowingly adopting the "particular business policy" suggested by Papco, i.e., discontinuing purchases of Nix-Size and, instead, purchasing and reselling Papco's cheaper and less effective imitation of Nix-Size as Nix-Size, because the jury had a basis for finding that Schultz acted as it did primarily to injure petitioners after petitioners had angered Samuel Schultz by refusing to permit him to make a "football" out of their product.

REASONS FOR GRANTING THE WRIT

This Court has held that, in a case of this type, presented in the posture of the present case immediately before the jury verdict, the evidence must be viewed in the light most favorabl

to petitioners.[13] So viewed, as the dissenting judges in the Court of Appeals noted (App. 15a), the evidence "reasonably permitted the jury's finding that the defendant Pennsylvania Paste Company***acted to destroy the plaintiffs' business, and the defendant Samuel Schultz & Co.***was aware of its purpose and design, and that it acted in concert with Pennsylvania to accomplish it."

In KLOR'S v. BROADWAY-HALE STORES, 359 U.S. 207 (1959), this Court reversed decisions of a district court and a

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13. CONTINENTAL ORE CO. v. UNION CARBIDE & CARBON CORP., 370 U.S. 690, 696, 697 (1962). That case also involved a trial judge's improper resolution of a jury issue in a civil anti-trust case and an attempt by a court of appeals to uphold the trial judge on a basis -- which this Court also concluded was erroneous -- never advanced by the trial judge.

court of appeals granting summary judgment for the defendants in a civil antitrust case. This Court stated (at p. 213):

> "***It (the conspiracy) interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character', a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.***"

In RADIANT BURNERS v. PEOPLES GAS CO., 364 U.S. 656 (1961), another civil antitrust case, this Court reiterated the principle applied in KLOR'S in granting certiorari and reversing judgments entered for the defendants as a matter of law. On that occasion, where the defendants were an associated group of larger businesses, this Court pointed

out (364 U.S. 660):

> "By §1, Congress has made illegal: 'Every[14] contract, combination...or conspiracy, in restraint of trade or commerce among the several States...' Standard Oil Co. v. United States, 221 U.S. 1. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

POLLER v. COLUMBIA BROADCASTING SYSTEM, 368 U.S. 464 (1962), is another civil antitrust case. There again, this Court granted certiorari and reversed in order to emphasize the importance of affording litigants a jury trial

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14. This emphasis has been supplied by the writer of this Petition.

of the issues. The Court said (368 U.S. 467):

> "***This rule [Rule 56-c] authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,...[and where] no genuine issue remains for trial...[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) ***

* * * * * * *

> "***We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.***" 368 U.S. 473.

While the foregoing cases dealt with the general impropriety of entering

summary judgment for defendants in civil antitrust cases, this Court, even more recently, had occasion to consider the same principles in the context of a jury trial. See CONTINENTAL ORE CO. v. UNION CARBIDE, 370 U.S. 690 (1962), supra. In view of the singularly frail reed on which the majority of the Court of Appeals has rested its conclusion in the present case, the following statement by this Court in the CONTINENTAL ORE case is particularly relevant here (370 U.S. 699):

> "***[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544...; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' American Tobacco Co., v. United States, 147 F.2d 93, 106

(C.A. 6th Cir.). See Montague & Co. v. Lowry, 193 U.S. 38, 45-46.

* * * * * * *

> "Undoubtedly, all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 35."

There are two material differences between the present case and those just cited, and these differences are the reasons why, we submit, this Court should grant certiorari and reverse.

1. First of all, in this instance, the trial judge, following the mandates which this Court laid down in the cases cited above. wrote careful opinions

denying motions for summary judgment and for a directed verdict at the conclusion of the petitioners' evidence. Then, with no recent holding by this Court to govern him, he departed entirely from his original conclusions and entered judgments N.O.V. at the conclusion of the four-month trial, and his decision was affirmed by a sharply divided Court of Appeals on the flimsiest of excuses. Clearly, if the policy which this Court has so frequently announced as governing at earlier stages in civil antitrust litigation is to reach fruition, that policy should be reaffirmed in a case where the jury has rendered its verdict.

2. There is a second reason, even more important, why we urge that certiorari be granted here. In the present

case, not only were petitioners small businessmen, but the defendants against whom the jury returned a verdict, while they had businesses substantially larger than was that of petitioners, were also proprietors of relatively small businesses. We feel that it is this circumstance which caused the trial judge — one well seasoned in antitrust litigation[15] — to do "a complete about face" - as the dissenting judges in the Court of Appeals noted (App. 35a) -- and enter judgment for the remaining defendants N.O.V. after the jury, by its verdict, acquitted Dow Chemical Company, the only "large" defendant in the case. In doing so, the trial judge initially, and the majority of the Court of Appeals

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15. In 1945, the trial judge wrote the oft-cited opinion in WILLIAM GOLDMAN THEATRE v. LOEW'S, INC.,150 F. 2d 738.

in affirming his decision, was obliged to ignore all of the well settled principles of law which he himself had stated previously were applicable to the evidence which petitioners presented.

Certain comments in the Opinion adopted by the majority of the Court of Appeals refer to alleged inconsistencies in Maurice Dovberg's testimony as to Schultz (10a, 12a) and indicate that Judge Ganey disbelieved such testimony. Clearly, under the principles so frequently announced by this Court, it was the jury's sole province to evaluate the explanations - ignored in the Court's opinion -- which Dovberg gave for the alleged inconsistencies.

Questions posed in the course of the reargument by other judges of the Court of Appeals who later voted with

the majority made it clear that these judges were influenced by such understandable, but nevertheless legally irrelevant, considerations as the size of the verdict as compared with the total volume of business which Schultz did with the petitioners and Papco, i.e., $3,300 with petitioners and $4,550 with Papco.

However, petitioners' was a small business. Their principal product, Nix-Size, was sold to Schultz for 30¢ a bottle. The dollar volume of business which petitioners did with any one customer was relatively small, but the evidence shows that the Schultz firm was one of petitioners' largest customers and that Schultz knew it (App. 27a). The dollar totals in question represented the equivalent of approximately 25,000 bottles of Nix-Size. Furthermore,

the Schultz firm was a leader, with seven widely distributed stores in the Philadelphia area. Obviously, the products which it handled and the prices which it charged for those products were keys to what others -- competitors of Schultz and customers of petitioners -- would handle and would pay. Finally, the evidence justified the jury in concluding that Liqui-Size was being marketed solely in an effort to destroy petitioners' little business, and that Schultz, with knowledge of what was occurring, chose to abandon petitioners and join Papco, not for any proper business motive, but because Schultz wished to hurt petitioners because they had refused to permit the Schultz firm to use their product -- which the Schultz firm was able to buy in larger quantities than its competitors

-- to hurt those competitors by selling the same beneath the standard fair trade prices.

Certainly, the jury was justified in concluding that, as between the petitioners and Schultz, Schultz should bear the brunt of the verdict. Indeed, if plaintiffs such as petitioners are not entitled to recover a verdict -- and more important, having persuaded a jury of the justice of their cause, if plaintiffs such as these are not entitled to hold a verdict -- against defendants such as Schultz, they are helpless against conduct which Congress has declared to be criminal and so contrary to public policy as to entitle <u>everyone</u> injured by such conduct to recover punitive damages from <u>all</u> <u>offenders</u>.

Other questions raised by Court of Appeals' judges who later voted with the majority indicated concern because retailers other than Schultz, who had also switched from Nix-Size to Liqui-Size and passed the latter off to the public as being Nix-Size, were not being assessed with any verdict. The fact is, however -- as the jury found by acquitting Atlas, the only other retailer against whom petitioners produced evidence, that the Schultz firm was in a position different from other retailers. It was more substantial. Admittedly, it had no difficulties selling substantial quantities of Nix-Size at its fair trade price. And unlike other retailers, Schultz was shown to have had positive knowledge of Papco's intentions at the time it elected to

abandon Nix-Size and market Liqui-Size.

As the proprietors of a business so small that it is entirely unlikely that their complaint could ever be the subject of a criminal prosecution by the United States against those who have injured them by violating the Sherman Act, little businessmen such as petitioners must depend entirely on litigation of this type to secure the relief required. And the Government of the United States must depend upon civil actions such as this to see that the policy of the Sherman Act is enforced in cases involving little business people as, by the broad terms of the statute, Congress clearly intended its policy to be enforced.

In such cases, the jury can be the shield of defendants as much as it can be the spear of the plaintiff. For the jury is as aware of the potential effect of its judgment on defendants who are small businessmen, as it is of the effect on the little plaintiff of the actions of the defendants who are small businessmen.[16] Therefore, in this type of case more than in any other, it should be the jury's province to resolve finally the issues of fact which the jury is called upon to resolve under the well settled principles which this

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16. The verdict here, before being trebled, was approximately one third the sum for which petitioners' counsel argued that the jury could return a verdict, under the evidence.

Court announces in other cases which, individually, may have greater public significance.

In MONTAGUE & CO. v. LOWRY, 193 U.S. 38 (1904), this Court granted certiorari and then affirmed a jury verdict of only $500 in a civil anti-trust case. One of the principal contentions of the defendant was (193 U.S. 46) the assertion that "***the sale of unset tiles (the product involved) is so small in San Francisco as to be a negligible quantity; that it does not amount to 1% of the business of the dealers in tiles in that City." But, in affirming the jury's verdict, this Court noted (193 U.S. 46): "***The amount of trade in the commodity is not very material, but***the combination, if carried out, directly effects a restraint of interstate commerce."

In MONTAGUE, this Court granted certiorari because of the principle involved, notwithstanding the size of the verdict. We ask that this Court grant certiorari here because, while the sums involved are "negligible", at least in terms of the public interest, the principle of the case is of vital significance, namely, that acts which are wrong under the Sherman Act are wrong when committed by small businessmen or large businessmen, and when a jury has determined that such a wrong has occurred and has awarded a plaintiff an appropriate verdict, that verdict must be viewed and upheld in accordance with the same principles applicable when larger businesses are involved.

Notwithstanding the sums involved, the attorneys for the parties in this case tried the case long and carefully

before a judge experienced in this field. That jurist, prior to the verdict, would seem to have been aware of the significance of the case, for he took the trouble to write a 75-page memorandum in the course of the trial and to prepare a charge annotated with citations and submitted to counsel for suggestions before it was read to the jury. A jury took four months from their collective lives to hear the case, to deliberate carefully, and then to render a decision which was both discriminating and in accordance with the trial judge's charge. On appeal, three judges, two of them the seniors in the circuit, reviewed the entire record and the two seniors voted to uphold the verdict. Then the entire Court of Appeals heard the matter reargued and

joined in writing two comprehensive opinions. Unfortunately, the opinion of the majority went off on a patently erroneous factual consideration so that, at this point, the matter has lost all public significance.

This case can be accorded the public significance to which it is entitled only if this Court will grant certiorari and pass on the real and substantial issues which the case does present.

Respectfully submitted,

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February 28, 1966

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Supreme Court of the United States

October Term, 1965.

No. 1085

IKE DOVBERG and MAURICE DOVBERG, Individually and t/a PASTE COMPANY OF AMERICA,
Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14302

IKE DOVBERG and MAURICE DOVBERG,
Individually and Trading as PASTE
COMPANY OF AMERICA,

Appellants,

v.

DOW CHEMICAL COMPANY, PENNSYLVANIA
PASTE COMPANY, SAMUEL SCHULTZ,
ADA SCHULTZ, MARVIN L. SPIRO and
ISADORE KAPLAN, Individually and
Trading as SAMUEL SCHULTZ & CO.,
A Partnership, and REBA SPIVAK,
Individually and Trading As
ATLAS WALLPAPER & PAINT CO.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

Argued September 26, 1963

Reargued October 7, 1965

Before: KALODNER, Chief Judge, BIGGS,
McLAUGHLIN, STALEY, HASTIE, GANEY,
SMITH and FREEDMAN, Circuit Judges.

OPINION OF THE COURT
(Filed December 3, 1965)

BY GANEY, Circuit Judge.

This is an action under the antitrust laws, §§1 and 2 of the Sherman Act, 15 U.S.C.§§1 and 2,[1] and of the Clayton Act, as amended, 15 U.S.C.§§13 to 15 inclusive.[2] Originally, the plaintiffs named nineteen defendants in the action, either individually or by their firm names. Through interrogatories and depositions, by way of discovery, and agreements to dismiss, the case went to trial on November 29, 1961, with only the Dow Chemical Company, Pennsylvania Paste Company, Samuel Schultz, Ada Schultz, Marvin Spiro and Isadore

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1 §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, provide, in part:

"Every...combination...or conspiracy, in restraint of trade or commerce among the several States...is declared to be illegal:..."

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States...shall be guilty of a misdemeanor..."

2 §4 of the Clayton Act, 15 U.S.C. §15, provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States...without respect to the amount in controversy..."

Kaplan, individually, and trading as Samuel Schultz & Co., Reba Spivak, individually, and trading as Atlas Wallpaper & Paint Co., and Samuel Milkas, individually, and trading as Empire Wallpaper & Paint Co. remaining as defendants.

As adverted to above, after bringing into the sweep of the alleged conspiracy nineteen defendants, only two, the Pennsylvania Paste Co. and Schultz, whom the jury found guilty of the conspiracy count, are left, who are the appellants here. A verdict was rendered in favor of two of the defendants, the Dow Chemical Co. and Reba Spivak, individually, and trading as Atlas Wallpaper & Paint Co., but, as indicated above, the defendants, Pennsylvania Paste Co. and Schultz were found guilty of violation of §1 of the Sherman Act. All the defendants were acquitted of charges contained in §2 of the Act after the court below had refused a motion for summary judgment and, at the close of the plaintiff's case, denied motions for judgment as to all the defendants, except Samuel Milkas, individually, and trading as Empire Wallpaper & Paint Co., against whom no evidence had been offered, and, at the conclusion of all the evidence, the defendants submitted motions for a directed verdict which were likewise refused by the court. Accordingly, after trial and judgment, the court below vacated the judgment and granted judgment n.o.v., in accordance with Rule 50(b) of the Rules of Federal Procedure. Thus, this appeal concerns itself only with the defendants, Pennsylvania Paste Co. and Schultz.

It is requisite, in order to determine whether the defendant, Schultz, was a party to an alleged conspiracy with the Pennsylvania Paste Co. to preserve the dominance of the Pennsylvania Paste Co. in the wet paste industry in this area, by driving the plaintiff out of business, to critically examine a long, tedious and dreary record of nearly 6,000 pages and over 500 exhibits. In order to place in precise focus the factual matters on which the alleged offense is predicated, it is necessary to place in some chronological order the dates and the exact testimony of the witnesses involved, rather than resort to any generalization.

This case was one of the longest ever tried in the history of the Eastern District of Pennsylvania, and the court below, knowing the intricacy thereof and the complexity of the evidence to be submitted, finally, after many weeks of discovery through depositions and interrogatories, directed the plaintiff, in order to bring the matter into proper focus, to file a pretrial statement of the contentions he was going to present at the trial in order to clarify the precise issue posed by the plaintiff, as well as to apprise the defendants of the nature of the cause of action he was suing on. After several requests for extensions, the plaintiff, on December 30, 1959, filed a 17 page pretrial statement in which he set forth, in great detail, his contentions, and in so doing gave the history of the case from 1949 on down to the filing of the second amended statement

of claim, on December 31, 1959. (It is to be noted that while the second amended statement of claim was filed one day after the pretrial statement of December 30, 1959, the amended statement of claim was in the hands of all of the counsel for defendants on November 17, 1959, and it was never amended or changed in the slightest.) The pretrial statement or statement of contentions of the plaintiff, as he labeled it under the heading, "b. The Legal Basis for the Claim Against Pa. Paste", on page 5 thereof, states: "plaintiffs' basic contention of law is that the Pennsylvania Paste Co. conspired with the other defendants to destroy the plaintiffs' business and thereby preserve Pennsylvania Paste's dominant position in the wet paste manufacturing business in the Philadelphia area" This contention was referred to time and time again in the plaintiff's argument and in his brief as being the real core of the conspiracy; that it was the intention of the defendant, Pennsylvania Paste Co., in order to maintain its supremacy in the wet paste industry in the Philadelphia area, to drive the plaintiff out of business. In the pretrial statement, The Legal Basis for the Claim Against Pa. Paste covers nearly 4 pages, the contentions as to the Dow Chemical Co. cover 3 pages and the contention therein stated as to the retailers covers approximately 1 page, ½ of which is devoted to the retailers generally, all of whom were acquitted or dismissed by the court, and less than ½ page to the basis for the plaintiff's claim against the defendant, Schultz.

Both charges against Schultz are short and, therefore, we quote the exact language, taking the second charge first, which is as follows: "Plaintiffs also contend that, pursuant to the conspiracy alleged, the defendant, Samuel Schultz, induced United Wallpaper Co. to imitate and sell an imitation of plaintiffs' cellulose paste and, that after plaintiffs' product had been patented, he also discouraged a potential purchaser of the plaintiff's business from following through on the purchase by telling the prospective purchaser that anyone could manufacture the plaintiffs' products." (Underscoring ours.)

The above occurred in the fall of 1951, and concerned itself with a product manufactured by Dovberg called "Calico", a cellulose base wallpaper paste, a package of which was brought to the Schultz store at 2104 North Front Street, Philadelphia, and given to him as a sample, and Schultz replied that if, when he tested the same, it worked out as Dovberg said it would, he would be glad to take it to the United Wallpaper Co., a large concern, and see if he could get them interested on Dovberg's behalf. He further told Dovberg he would tell him what they thought of the product and if they liked it, they would not only manufacture it, but they would also license rights for it. Schultz promised to let him know about it and Dovberg said he was "very grateful and very much elated." However, Dovberg never again discussed this matter with either Schultz or any representative of his and the matter was dropped and there is

nothing in the record to show whether the United Wallpaper Co. thought anything of the product or that they manufactured it. Therefore, it is obvious from the record that there is no warrant for this allegation against Schultz and it must be discarded.

The remaining and sole contention which must be relied upon by the plaintiffs is the second and last one wherein the pretrial statement reads as follows: "Plaintiffs also contend that, at the instigation of the Pennsylvania Paste Co. and pursuant to the conspiracy alleged, the retail defendants sold the wall-size eliminator which they purchased from the Pennsylvania Paste Co. as being the same thing as Nix-size. Apart from its connection with a conspiracy to restrain trade, such an activity would be improper under the principles in the RESTATEMENT TORTS §§711 and 712(1), 741(b) and 743." (Underscoring ours.)

The statement of claim filed September 25, 1958, makes it requisite, in the face of the four-year statute of limitations, that the actionable cause of conspiracy concerns itself with the conduct of Schultz and the Pennsylvania Paste Company from September 25, 1954, to September 25, 1958.

The theory of the plaintiff is that the conspiracy had its origin in the conduct of the parties previous to 1954, and more particularly, that there was a conspiracy to drive the plaintiff, Dovberg, out of business in order for the Pennsylvania Paste Company to maintain its dominant position in the wet paste industry which allegedly originated previous to 1954, and as hereafter adverted to.

Briefly, the facts, as regard Schultz's alleged participation in a conspiracy with the Pennsylvania Paste Company, concern a relatively small part of the record and we shall relate them. The Pennsylvania Paste Company held a dominant position in the manufacture of wet paste and had been so doing since 1892, and it controlled more than 50% of the wet paste marketed in the Philadelphia area and, although it made dry paste, the manufacture of wet paste was much more profitable and it, accordingly, concentrated on it. The plaintiff, as early as 1949, was manufacturing a wall-size eliminator called Nix-size and in February, 1950, opened a small plant for the making of Nix-size and wet paste. The plaintiff marketed its wet paste in wooden tubs and sold the same in the Philadelphia area to its customers, some of whom formerly had been with the Pennsylvania Paste Company. The record discloses that many of these tubs were appropriated by the Pennsylvania Paste Company drivers and later, when the plaintiff changed its wet paste product to be marketed in fiber drums, these drums likewise mysteriously disappeared and, although the Pennsylvania Paste Company denied any participation therein, the plaintiff found, upon visiting the plant of the Pennsylvania Paste Company, that some of these containers were in their plant. Nevertheless, the record is devoid of any connection of Schultz with this conduct and, in fact, his name was never mentioned in connection therewith as up to this time he had not begun to purchase wet paste from the plaintiff, Dovberg. However, Schultz, who had been doing business with the plaintiff as related since 1949 in other products such as Nix-size, began buying wet paste from

the plaintiff on Aubust 25, 1950, and continued up to October 28, 1950, when he discontinued buying from Dovberg, as he had purchased during this period the trivial amount of $32, although he maintained business with Dovberg buying his related products until March of 1952, when he discontinued purchasing Nix-size from him, which, as shall be adverted to later, has nothing whatsoever to do with the plaintiff's going out of the wet paste business. The testimony plainly shows that, although the plaintiff first testified he went out of the wet paste business in October, 1950, on later examination, he stated finally that he went out of the wet paste business in January, 1951, and he further testified that he so did because the Pennsylvania Paste Company was successful in driving him out of it and, in so stating, he never accused Schultz of any complicity whatever in his abandoning the wet paste business. He further testified that he never made wet paste thereafter, except on rare occasions and for a few special customers and, accordingly, he was, in no sense, in the wet paste business as to be competitive of the Pennsylvania Paste Company thereafter. As of January 1, 1951, it is apparent that the "conspiracy alleged" of both the Pennsylvania Paste Company and Schultz, in driving the plaintiff out of the wet paste business in order that the Pennsylvania Paste Company might maintain its dominance in the wet paste industry, died aborning, as Schultz was, on the record, in no wise connected therewith. While the record discloses that in a

telephone conversation between the plaintiff, Dovberg, and Flanagan of the Pennsylvania Paste Company, on September 12, 1950, Flanagan told the plaintiff, Dovberg, that he understood he was making wet paste and that he would "drop dead" before he would lose one customer to him and that he was going to drive him out of business, that, here again, there is nothing in the record showing any connection whatsoever of Schultz with this statement of Flanagan or any conduct on the part of Schultz which could be construed as anything agreeing with the statement Flanagan made, as Schultz's name was not even mentioned in connection therewith. It is to be remembered that at the time this statement was allegedly made by Flanagan, Schultz had already stopped buying wet paste from the plaintiff, Dovberg, even though it was in exceedingly small amounts totaling, as adverted to before, some $32. On another occasion, late in 1951, Dovberg testified that Schultz called him and testified that Flanagan was "gunning mad" at him for purchasing his wet paste and Schultz advised him not to make wet paste for if he continued to make and sell it Flanagan was the type of fellow who could put him out of business. It is to be remembered that this is flatly contradictory of Dovberg's previous statement that the Pennsylvania Paste Company had successfully driven him out of business on January 1, 1951, as well as the fact that Schultz had stopped purchasing wet paste from Dovberg on October 28, 1950. This is the only testimony that, in any wise, connects

Schultz with any knowledge of any relationship between the plaintiff, Dovberg, and the Pennsylvania Paste Company. However, it is also to be remembered that at the time of this conversation Schultz and Dovberg were on the most friendly terms and Schultz continued to do business with Dovberg for more than a year and a half thereafter. The record further discloses that Schultz stopped purchasing Dovberg's products on March 14, 1952, and the day before Schultz called Dovberg on the phone and told him the reason therefor that Flanagan of the Pennsylvania Paste Company was in to see him and left a sample of a product just like Nix-size and advised him, Schultz, that it had the same effect as Nix-size and that he would manufacture it for him under Schultz private label, since Schultz, a very large retailer, sold most of his products under his own label. He further advised plaintiff Dovberg, that he had a contract from the Pennsylvania Paste Company on his desk to buy the product and that he could sell it for much less than he could get Nix-size from Dovberg and by reason of these circumstances, when he had sold out his present inventory which he had purchased from him, Dovberg, he was not going to buy any more from him. Dovberg's reply to Schultz in this conversation was that he could not conceive of Flanagan selling a product similar to his at a lesser price unless he was putting into effect a threat he had made to him, Dovberg, to put him out of business and "<u>if they did anything in joining an effort combined to hurt our</u>

business" that he would have to hold Schultz responsible therefor. (Underscoring ours.) However, on the very same day he wrote a letter to Schultz wherein he referred to this conversation, but made no mention whatsoever of a threat that had been made to him nor anything whatsoever about a joint effort to put him out of business. Furthermore, he closed the letter referring to their very good friendship and the friendly company that was Schultz, whom he "yearns to do business with" and with the hope that they would be able to serve him in the future. The only conclusion that could be drawn from the letter was one of a warm spirit of friendship and the regret that he was no longer to do business with him, Dovberg. If we draw the most favorable inference possible from the conversation and letter, it certainly does not comprise a conspiracy between defendant, Schultz, and defendant, Pennsylvania Paste Company, through Flanagan, concerning the wet paste business. For here again, it is to be remembered that this conversation in which defendant, Schultz, advised the plaintiff, Dovberg, that he was no longer going to buy Nix-size because it produced the same results as Nix-size did and because it was cheaper, was more than a year and a half after Schultz stopped purchasing wet paste from the plaintiff, Dovberg, and more than a year after Dovberg had gone out of the wet paste business for which he personally accused only the Pennsylvania Paste Company.

During the years 1954 to 1958,

which constitute the actionable claim for conspiracy, the record is devoid of any conversations between the Pennsylvania Paste Company and the defendant, Schultz, concerning the plaintiff, Dovberg, from which anything like a conspiracy could be inferred and there was nothing in the conduct of the defendant, Schultz, other than his purchasing Magi-coat, similar in style and effect to Nix-size, but at a lesser price, which was manufactured by the Pennsylvania Paste Company for Schultz under his private label, Magi-coat, and Schultz's failure to make any further purchases of anything whatsoever from Dovberg thereafter.

It is likewise significant that through hundreds of pages of testimony covering some nineteen witnesses over many days of trial, they concerned themselves solely with various customers complaining to plaintiff, Dovberg, that the Pennsylvania Paste Company was selling Liqui-size, which it manufactured at a cheaper price than Nix-size, and, in some instances, Flanagan again threatened to drive Dovberg out of business, but in this long record of testimony there is not a single instance in which any of these customers ever even hinted at Schultz's being involved with the Pennsylvania Paste Company in any conspiracy, nor, in fact, even mentioned Schultz's name in connection therewith.

It may well be that, on a better record, though questionably, a case of unfair competition might be made out against the Pennsylvania Paste Company for palming off their products,

Liqui-size and Magi-coat, allegedly in imitation of the plaintiff's product, Nix-size. However, nothing in the testimony, it is submitted, gives rise to an actionable case of conspiracy against the plaintiff between the Pennsylvania Paste Company and Schultz.

A critical examination of this record shows, neither directly nor by circumstantial evidence, any conspiratorial conduct on the part of Schultz with the Pennsylvania Paste Company, to drive the plaintiff, Dovberg, out of business, in order to preserve the Pennsylvania Paste Company's dominant position in the wet paste industry. We reach this conclusion, using as the guide on appeal, that this court must consider the evidence in its strongest light in favor of the party against whom the motion is made and the appellant here, and giving him the advantage of every fair and reasonable intendment that the evidence can justify. Delaware Valley Marine Supply Co. v. American Tobacco Co., (3rd Cir.), 297 F.2d 199, cert. denied 369 U.S.839; Hornin v. Montgomery Ward & Co., (3rd Cir.), 120 F.2d 500; Viking Theatre Corp. v. Paramount Film Distributing Corp., (3rd Cir.), 320 F.2d 285, aff'd 378 U.S. 123; Pearl Assurance Co. v. Stacey Bros. Gas Construction Co., 114 F. 2d 702; Continental Ore Co. v. Union Carbide, 370 U.S. 690; Moore's Federal Practice, 2nd Ed., Vol. 5, p. 2316.

Accordingly, the order of the court below in granting judgment n.o.v. is affirmed.

KALODNER, Chief Judge, dissenting:

I dissent from the majority's conclusion that the evidence was insufficient to support the jury's verdict, and its affirmance of the District Court's Order granting the defendants' motions setting aside the jury's verdict in favor of the plaintiffs.

In my opinion, the evidence, viewed in the light most favorable to the plaintiffs, as it must be,[1] reasonably permitted the jury's finding that the defendant Pennsylvania Paste Company ("Pennsylvania") acted to destroy the plaintiff's business, and the defendant Samuel Schultz & Co. ("Schultz") was aware of its purpose and design, and that it acted in concert with Pennsylvania to accomplish it.

This is an action under Sections 1 and 2 of the Sherman Act,[2] and Sections 2, 3 and 4 of the Clayton Act[3] as amended by the Robinson-Patman Act. The plaintiffs, Ike and Maurice Dovberg, trading as Paste Company of America, were, until 1957, manufacturers of dry and cellulose based wallpaper paste and wall size eliminator. Pennsylvania manufactures wallpaper paste and related products, and Schultz, among other things,

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1 Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 697 (1962).

2 15 U.S.C.A.§§1 and 2.

3 15 U.S.C.A.§§13, 14, and 15.

retails paste products. The named parties were engaged in business in the City of Philadelphia, Pennsylvania, at the times relevant here. The plaintiffs' basic contention in their action is that Pennsylvania and Schultz conspired to destroy their business and thereby preserve Pennsylvania's dominant position in the wet paste manufacturing business in the Philadelphia area.

The case is now here because the trial court following its pre-trial denial of the defendants' motions for summary judgment, 195 F.Supp. 337 (E.D. Pa. 1961), and its subsequent denial at the conclusion of the plaintiffs' testimony, of the defendants' motions for directed verdicts and dismissal,[4] then granted the defendants' motions for judgment n.o.v.,[5] or in the alternative for a new trial, following a jury's verdict of $22,000 in favor of the plaintiffs, and against both defendants, which verdict had been trebled by the trial court pursuant to the statute.

The trial court premised its Order and Direction for Judgment n.o.v.[6] on its determination (1) that "no evidence has been adduced indicating any plausible or rational motive for Samuel Schultz & Co. to have entered into a conspiracy...to

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4 The opinion of the District Court denying these motions is unreported

5 The defendants had timely moved for a directed verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

6 The "Order and Direction for Judgment" is not reported.

force plaintiffs out of business"; (2) "no other probative evidence has been introduced linking Samuel Schultz & Co. conspiratorily with Pennsylvania Paste"; (3) "Pennsylvania Paste is legally unable to conspire with itself and therefore violate §1 of the Sherman Act (15 U.S.C.§1)"; and (4) "There has thus been total failure and lack of evidence to prove the essential elements of plaintiffs' case relating to guilt of Samuel Schultz & Co." It premised its alternative granting of the defendants' motion for a new trial on its determination "that such substantial portions of the testimony of plaintiff Maurice Dovberg (on the stand over 6 weeks and over 4200 transcript pages) ranged from deliberate obfuscation to deliberate fabrication, and from fantasy to the bizarre, and that said testimony, on the whole, cannot be granted much credence, the Court thus concludes that the jury verdict is against the weight of the credible evidence."

On this appeal the plaintiffs urge that the trial judge erred in granting the defendants' motions for judgment n.o.v. or in the alternative for a new trial.

This dissent concerns only the judgment n.o.v. issue in view of the majority's disposition.

In essence, the critical question it presents is whether the trial judge was right when he first denied the defendants' motions for a directed verdict at the conclusion of the plaintiffs' case on the ground that sufficient evidence had been presented by the plaintiffs

to support their action if the jury credited it, or whether he was right when he found in granting judgment n.o.v. that the evidence was insufficient.

The trial judge exhaustively reviewed the plaintiffs' evidence in the 75-page Opinion in which he denied the defendants' motions for a directed verdict at the conclusion of the plaintiffs' case.

In that Opinion he said with respect to the plaintiffs' testimony in support of their allegation that "Pennsylvania Paste conspired with the other defendants to destroy plaintiffs' business... and thereby preserve Pennsylvania Paste's dominant position in the wet paste manufacturing business in the Philadelphia area..."

> "While the great bulk of it [plaintiffs' testimony] was heresay, there does appear to be a modicum of direct testimony admitted to raise a substantial issue of fact as to the truth of the allegation...Pennsylvania Paste's motion is denied. A sufficient quantum of evidence has been adduced by plaintiffs to allow the case against this defendant to go to the jury. Evidence has been adduced, for example, as to alleged statements of Mr. Flanagan, of Pennsylvania Paste's intent to force plaintiffs out of business; of Pennsylvania Paste placing on the market Liqui-Size with the intent to force plaintiffs out of business; of Pennsylvania Paste's costs being the same or higher than those of

plaintiffs; of Pennsylvania Paste selling its product for prices below cost; of Pennsylvania Paste taking butter tubs belonging to plaintiffs. In short, sufficient factual questions have been presented by plaintiffs to allow the jury to rule on the issues." (emphasis supplied)

Again, with respect to the plaintiffs' allegations charging Schultz with conspiring with Pennsylvania "to drive plaintiffs out of business" the trial court said:

"Substantial evidence has been introduced to this effect...Schultz's motion is denied. Evidence has been adduced that Schultz knew of Pennsylvania Paste's illegal aim; that Schultz acted in furtherance of it by selling the wall size eliminator purchased from Pennsylvania Paste as being, or being the same thing as Nix-Size. Of itself, such evidence is legally sufficient to allow the jury to rule on the allegations." (emphasis supplied)

These well-settled principles must be applied in deciding whether the trial judge erred in granting the judgments n. o.v. under review, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure:[7]

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7 The relevant portion of Rule 50 (b) provides:

"If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

It is settled that Rule 50(b) has not withdrawn from juries their exclusive power to weigh evidence and determine contested issues of fact since a jury is "the constitutional tribunal provided for trying facts in courts of laws."[8] The Rule presents only the question of law, as to whether, when all the evidence is considered, together with all reasonable inferences which may be drawn therefrom most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case;[9] otherwise stated, the question is whether the evidence is sufficient to sustain the verdict. Where reasonably fair-minded men may differ as to the conclusions of fact to be drawn from the evidence, a jury is the proper tribunal to decide the issue.[10]

It may be noted parenthetically that the issues were here submitted to the jury in a 39-page charge. That it was discriminating in its consideration of the testimony, is evidenced by the fact that after it had deliberated for over 24 hours before reaching its findings, it found in favor of the plaintiffs against the defendants Pennsylvania and Schultz only on the conspiracy

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8 Berry v. United States, 312 U.S. 450, 452-453 (1941).

9 Morris Brothers Lumber Company v. Eakin, 262 F.2d 259, 263 (3 Cir.1959), to the same effect see Wong v. Swier, 267 F.2d 749, 753 (9Cir. 1959).

10 McCoy v. Moore, 140 F.2d 699, 700 (D.C.Cir. 1944).

count[11] of the charged Sherman Act violation, and in favor of Pennsylvania and Schultz on the monopoly count;[12] further, the jury found against the plaintiffs in favor of the defendant Dow Chemical Company, supplier of the principal ingredients of one of the plaintiffs' major products, and the defendant Atlas Wallpaper & Paint Company, a retailer.

It may further be stated that counsel had spent five days in summing up. The trial here was the longest in the history of the Eastern District of Pennsylvania. It began on November 28, 1961 and was concluded on March 29, 1962. The plaintiffs' principal witness, Maurice Dovberg, was examined on 35 days; his testimony alone covered more than 4300 pages. Eighteen other witnesses also testified for the plaintiffs over a period of five days; their testimony covered 700 pages. Some 426 exhibits were offered and admitted in the plaintiffs' case. The defendants' case took over 20 trial days, covering 1700 pages of testimony; their exhibits numbered 277.

Stated in broad outline, the plaintiffs sought at the trial to establish that from 1950 through 1957 they manufactured and sold an additive for wallpaper paste and related products throughout the eastern part of the United States; that during that period Pennsylvania acted to destroy their business in order to preserve Pennsylvania's

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11 15 U.S.C.A. Sec. 1.
12 15 U.S.C.A. Sec. 2

dominent position as a wet wallpaper paste manufacturer in the Philadelphia area, by manufacturing and selling below cost a wall size eliminator whose form, composition and packaging were a conscious imitation of the plaintiffs' wall size eliminator—"Nix-Size";[13] that Schultz, the largest wallpaper and paint distributor in the Philadelphia area, who was the plaintiffs' largest customer, conspired with Pennsylvania to destroy the plaintiffs' business by cutting off its purchase of the plaintiffs' product and purchasing Pennsylvania's imitation instead and marketing it as the plaintiffs' product or as identical to the plaintiffs' product.

The plaintiffs' testimony adduced at the trial on the issue of conspiracy to violate the anti-trust laws, insofar as Pennsylvania is concerned, was as follows:

Pennsylvania has been a manufacturer of wet and dry wallpaper paste since 1892. During 1950 through 1957 approximately 45% of its total business was in wet wallpaper paste; it controlled 50% of the wet paste market in Philadelphia. Its sales of wet paste were more profitable than the sale of its other principal product, dry paste, since the former enjoyed a higher mark-up—90%. Its sales of wet paste declined steadily throughout 1950 to 1957.

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13 A wall size eliminator is a product which, when added to conventional wallpaper paste, eliminates necessity of a separate sizing operation.

In 1949, the plaintiffs applied for a patent and began to sell its wall size eliminator "Nix-Size". In February of 1950 they purchased a factory in Philadelphia for the manufacture of "Nix-Size" and wet paste. In the spring of 1950, D. J. Flanagan, president of Pennsylvania, visited plaintiffs' factory and learned of the use to which it was to be put. He obtained a sample of "Nix-Size", took it to a firm of consulting chemists and received from them a formula for a competitive product. Plaintiffs first marketed their wet paste in returnable wooden butter tubs which cost them 95 cents each. They charged a 35 cent deposit per tub to purchasers of the wet paste. They began to sell the wet paste to many of Pennsylvania's customers and when they attempted to retrieve the tubs they rarely were successful. On September 12, 1950, one of plaintiffs telephoned Flanagan complaining that retailers had reported that Pennsylvania's drivers were picking up the tubs and requested that they be stopped. Flanagan denied such activity. In September, 1950, plaintiffs bought fibre drums at a dollar each to market their wet paste. Although they were marked as their property they, too, were not returned. Again, Flanagan denied knowledge of their disappearance. In the spring of 1951 one of the plaintiffs visited Pennsylvania's plant and found some of their wooden tubs and fibre drums there. Meanwhile, in December, 1950, Pennsylvania too marketed its wet paste in fibre drums similar to those of the plaintiffs. Although these drums held one and one-half quarts more paste than the wooden tubs,

Pennsylvania didn't raise its price; the plaintiffs had to meet it and sell at a loss. By 1951, the plaintiffs were forced to stop large scale marketing of wet paste because of their losses, due to inability to raise prices and lost drums. When they did so Pennsylvania raised its prices. Plaintiffs, however, continued to market small quantities of wet paste and to advertise.

Plaintiffs' principal product was "Nix-Size", the wall size eliminator. At the time that it was first manufactured in quantity, there were no competitors. However, plaintiffs became aware of rumors to the effect that Flanagan had had "Nix-Size" analyzed and that he was planning to market a similar product. In the earlier mentioned conversation of September 12th, one of the plaintiffs mentioned this to Flanagan. Flanagan replied that he understood that the plaintiffs were manufacturing wet paste in competition with Pennsylvania and said that "if I lose one customer, I would sooner drop dead on the street;" and furthermore, so long as the plaintiffs continued to manufacture wet paste Pennsylvania would imitate any product they manufactured and could afford to out produce and undersell them even to the point of suffering losses, until they were put out of business. In October, 1950, Pennsylvania marketed a competing product, "Liqui-Size". "Liqui-Size" had the same appearance as "Nix-Size"; was packaged in the same quantities; contained essentially the same ingredients; was merchandised as being identical to "Nix-Size" and contained the same directions for use as

"Nix-Size". In the spring of 1952, "Liqui-Size" was packaged in a bottle identical to that used for "Nix-Size". Although "Liqui-Size" was sold as essentially identical to "Nix-Size", a paperhanger, Mrs. Rosner, testified that she had used both products and that "Liqui-Size" had proved unsatisfactory, relative to "Nix-Size", primarily because it took twice as much "Liqui-Size" to do the exact same job as "Nix-Size". Later, Dr. Obold, Chairman of the Department of Biochemistry at Drexel Institute of Technology, testified that it was his belief that if "Liqui-Size" performed as Mrs. Rosner had related, then this was an indication that it probably contained more water than "Nix-Size", and therefore would be possessed of less adhesive quality.

On December 20, 1950 plaintiffs sent a registered letter, with return receipt to Flanagan, in which they accused Flanagan of perpetrating "diabolical" acts calculated to drive them out of business, and requested that he please refrain from further applying these "ruthless tactics." Flanagan made no response to this letter. After the appearance of "Liqui-Size" on the market, "Nix-Size" sales fell off. Plaintiffs spoke with several of their customers and found that Flanagan had continued to merchandise "Liqui-Size" as identical to "Nix-Size" but less expensive, and given favors and free merchandise to retailers. Prior to Pennsylvania's marketing of "Liqui-Size" plaintiffs had profitably sold their "Nix-Size" for $4.20 a dozen and $48.00 per gross.

"Liqui-Size" entered the market at $3.75 per dozen and on March 19, 1951 the price was reduced to $3.50 per dozen and $3.20 on gross purchases. The latter prices continued through 1952. Plaintiffs were required to meet Pennsylvania's pricing structure and to sell at a loss. In November 1953, Pennsylvania's prices fell to $3.00 a dozen, although costs of production had increased. Pennsylvania made a small profit in 1952 but suffered losses in 1953 and 1954. On September 12, 1952, plaintiffs sent a second letter to Flanagan accusing Pennsylvania of attempting to confuse potential customers by packaging "Liqui-Size" in a bottle which was identical to the bottle in which "Nix-Size" was sold, and of subjecting the plaintiffs to a staggering and unfair competitive burden. This letter was likewise unanswered. A final letter was sent to Flanagan on March 11, 1955 in which plaintiffs beseeched him to put an end to imitation of the plaintiffs' products. As before, no answer was forthcoming.

Plaintiffs' losses on their sales of "Nix-Size" after 1950 depleted their capital and their business was gradually throttled. By 1956 they could no longer fill their orders and this was an important factor in the eventual destruction of their entire business.

Plaintiffs presented the following testimony with respect to the alleged participation of Schultz in the conspiracy.

Schultz operated the largest chain of wallpaper and paint stores in the

Philadelphia and Camden areas. It was one of the plaintiffs' best customers and it knew it. Schultz tested the plaintiffs' "Nix-Size" in September, 1949 and it then purchased it in increasing quantities for some time. By 1950 Schultz was selling "Nix-Size" in every one of its stores. At that time it also began purchasing the plaintiffs' wet paste. It discontinued purchases of the wet paste on October 28, 1950. It continued its purchases of "Nix-Size" until March 1952. At that time Schultz telephoned the plaintiffs that it had been given a sample of Pennsylvania's "Liqui-Size" and had been assured by Flanagan that "it was just like 'Nix-Size'"; that Flanagan had given it permission to sell the product under Schultz' private label of "Magicoat Liquid Size", at a price lower than the price of "Nix-Size"; that Schultz would no longer buy "Nix-Size".

Earlier, in November, 1951, Schultz told the plaintiffs that Flanagan was "gunning mad" because it had been purchasing the plaintiffs' wet paste and that "if you fellows continue to sell wet paste, this fellow could put you out of business. He is just the fellow who can do it."

It was testified that individuals who attempted to purchase "Nix-Size" at various Schultz stores were invariably told "We don't have 'Nix-Size' in stock. We sell 'Magicoat', it is the same thing," or that "Magicoat" was in fact "Nix-Size".

Plaintiffs also testified that

Schultz at one time repackaged "Nix-Size" under its own label and that at another time it sold "Nix-Size" at sharp discount, "at the instigation of Pennsylvania."

Spiro, a Schultz partner, testified that "Nix-Size" was more salable than Pennsylvania's "Liqui-Size", and Schultz' privately-labeled "Magicoat", and that Schultz' mark-up on its private brand was less than the difference between the cost and the fair trade price of "Nix-Size". Thus, Schultz actually sacrified potential profits when it sold Pennsylvania's product and its own, instead of the plaintiffs' "Nix-Size".

In defense, Flanagan denied Pennsylvania ever had any intention to put the plaintiffs out of business, or having any motive for doing so, or that he ever made a statement that he would do so, and Schultz denied entering into any conspiracy with Pennsylvania with respect to the plaintiffs, and contended that its business with the plaintiffs was insignificant, as was its sales of wallpaper paste.

The trial judge in his charge to the jury correctly submitted to it in sharp and precise focus the issues it was to resolve.

He said:

"A conspiracy under the Anti-Trust Acts is an understanding with respect to engaging in a course of conduct the result of which is to restrain trade. One defendant alone cannot be guilty of being a conspirator. A

conspiracy must contain two or more persons or corporations.

"One need not trade with anyone with whom he does not wish to trade. One need not trade with anyone or everyone who wishes to do business with him. One need not compete in a half-hearted or constrained manner. But there are limitations on one's business activity. One may not make a decision not to do business with another as a result of a conspiracy to drive the other party out of business. One may not compete against him in various ways (to be detailed throughout this charge), as a result of or after having joined a conspiracy the purpose of which is to drive the competitor out of business.

"The crucial question in this case is: did two or more of the defendants combine, conspire or agree to do various acts, such as not selling to the plaintiff on credit, not buying from the plaintiffs, and not competing fairly with the plaintiffs for the purpose of driving the plaintiffs out of business.. Did the defendant Samuel Schultz and Company and the defendant Atlas Wallpaper & Paint Company cease purchasing and selling the plaintiffs' products as a result of a business decision on their part or to assist Pennsylvania Paste Company in driving plaintiffs out of business? Did the defendant Pennsylvania Paste

> Company act towards the plaintiffs as it did, (their actions, of course, to be determined by you), as a result of independent business judgment on its part or as a result of an agreement, combination or conspiracy, or while inviting others to assist it in acting in destroying the plaintiffs' business?" (emphasis supplied)

The trial judge gave further required instructions relating to tests to be applied by the jury in answering the posed questions.

He specifically charged that while conspiracy may be proved by circumstantial or inferential evidence alone

> "...it is necessary not only that the circumstances proven by the evidence shall reasonably give rise to an inference of conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the evidence of conspiracy and the other inconsistent, you should not infer the existence of conspiracy from such evidence alone."

He also charged that the evidence must show (1) that someone "has embarked on an unlawful course of action with which cooperation is invited, and (2) that the defendant, or any other person who is claimed to have been a conspirator,

knowingly and willfully participated in the accomplishment of that plan with the intent to advance or further some object or purpose of the plan."

On review of the record I am of the opinion that the trial judge was right when, in denying the defendants' motions for a directed verdict at the close of the plaintiffs' case, he said "sufficient factual questions have been presented to allow the jury to rule on the issues" with respect to the case against Pennsylvania, and that "substantial evidence has been introduced" with respect to Schultz' participation in a conspiracy, and that he was wrong when, in his "Order and Direction for Judgment n.o.v." he stated "there is a total failure and lack of evidence to prove the essential elements of plaintiffs' case relating to guilt of Samuel Schultz & Co." and that, accordingly the jury's verdict cannot stand against Pennsylvania because "Pennsylvania is legally unable to conspire with itself and thereby violate §1 of the Sherman Act [15 U.S.C. §1]." On the score of the latter finding it must be observed that the trial judge has not found that the evidence was insufficient to sustain the jury's implicit finding that Pennsylvania acted to destroy the plaintiff's business.

It can be said of the evidence here that reasonably fair-minded men may differ as to the conclusions to be drawn from it. That being so, under settled law it remains in such a situation for the jury to select the conclusion it deems proper.

As was said in Myers v. Reading Co., 331 U.S. 477 (1947) (pp.485-486):

> "...where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

That there was here evidence to sustain the jury's finding that Schultz conspired with Pennsylvania to drive the plaintiffs out of business, was expressly found by the trial judge, in his opinion denying the defendants' motion for a directed verdict at the conclusion of the plaintiffs' testimony.

In that opinion the trial judge said:

> "Schultz is charged with 'discontinuing and refusing to resume... [his] purchases of wall size eliminator' from plaintiffs, 'with knowledge of Pennsylvania Paste's intent' to drive the plaintiffs out of business.
>
> "Evidence has been introduced of Schultz' discontinuance of purchases from plaintiffs and his refusal to resume purchases. Evidence has also been introduced to the effect that plaintiff Dovberg told Schultz of Pennsylvania's alleged intent

and that Schultz was aware of it...[14]

"Plaintiffs charge that 'at the

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14 The plaintiff Maurice Dovberg testified that on March 13, 1952 a Schultz partner, Samuel Schultz, called him on the phone and "told me that Mr. Flanagan of the Pennsylvania Paste Company was in to see him and left a sample of a product just like Nix-Size. In fact, he assured me, he said 'It is exactly the same as your Nix-Size. This is a sample of what he is going to manufacture for me under our private label.'

"He also told me that he had a contract, an agreement, that he had on his desk to sign, and when he signed that agreement, that in effect, he would stop buying Nix-Size, and after he consumed, sold out, his present inventory, he wouldn't buy from us again. He said he tried Pennsylvania's Nix-Size - that's how he referred to it - 'and I found it to be exactly the same as yours, and Mr. Flanagan is going to sell it to me for much less than what I can get it from you.'

"At this point I advised Sam Schultz that we had patents pending, that we hadn't licensed anyone to manufacture any imitation or similar product as ours, especially where such products would serve the same general principles, and I told Sam Schultz that I can't conceive that Mr. Flanagan would be able to sell him an imitation of our Nix-Size in exactly the same form, the same product, at a lesser price, unless

(Footnote 14 continued on next page)

instigation of Pennsylvania Paste ...[Schultz] sold the wall size eliminator...purchased from Pennsylvania Paste as being, or being the same thing as Nix-Size'. Substantial evidence has been introduced to this effect." (emphasis supplied)

At a later point in this same opinion, the trial judge made statements quoted earlier in his opinion that, as to Pennsylvania, "A sufficient quantum of evidence has been adduced by plaintiffs to allow the case against this defendant to go to trial" and, "In short, sufficient factual questions have been presented by plaintiffs to allow the jury to rule on the issues"; and as to

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(Footnote 14 continued)

he was enforcing the threat that he had made to me that he would produce the same product, sell it for less or below the cost I could afford to sell ours, in an effort to put us out of business; and I told Sam Schultz that if he sold Mr. Flanagan's manufactured product under his exclusive label, and if they did anything in joining an effort, combined, to hurt our business, that I would have to hold Mr. Schultz as responsible as I would the Pennsylvania Paste Company if they damaged our business.

"Q. What did Mr. Schultz say then?

"A. Well, he laughed and he said, 'It was nice doing business with you, Kid,' and that terminated the conversation."

Schultz, that "Evidence has been adduced that Schultz knew of Pennsylvania Paste's illegal aim; that Schultz acted in furtherance of it...[and] such evidence is legally sufficient to allow the jury to rule on the allegations."

The trial judge did a complete about-face when he subsequently found in granting judgment n.o.v. that "There has been total failure and lack of evidence to prove the essential elements of plaintiffs' case relating to guilt of Samuel Schultz & Co."

I would reverse the Order granting the defendants' motions to vacate and set aside the judgment in favor of the plaintiffs for the reasons stated at the outset of this dissent, namely, the evidence in the instant case viewed in the light most favorable to the plaintiffs, as it must be, reasonably permitted a jury finding that Pennsylvania acted to destroy the plaintiffs' business and that Schultz was aware of its purpose and design and that it acted in concert with Pennsylvania to accomplish it.

Judges Biggs and Staley concur in the views expressed in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(Caption omitted)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, Chief Judge, and BIGGS, McLAUGHLIN, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court granting judgment n.o.v., filed November 8, 1962, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF

Clerk

December 3, 1965

(Caption omitted)

SUR MOTIONS FOR
DIRECTED VERDICTS

(Appearances omitted)

LEAHY, Senior District Judge.

The general nature of the case at bar was discussed in the denial of defendants' motion for summary judgment. 195 F.Supp. 337.

At trial, after plaintiffs rested, defendants made their motions under FR 50 for directed verdicts. "All the involved perambulations of the numerous decisions on this problem [a motion for directed verdict] are merely amplifications of ... two cardinal principles."[1] These are 1. without weighing the credibility of the witnesses, if there can be but one reasonable conclusion as to the verdict, the court should determine the litigation by directed verdict; and 2. where the evidence is conflicting or there is insufficient evidence to make only a "one-way" verdict possible, a directed verdict is improper. The function of the motion is to test the legal sufficiency of the evidence; it raises solely a question of law; and the court must resolve all conflicts against the defendant.[2] Thus, a directed verdict

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1. 5 Moore, Fed. Prac. §50.02 [1] pp. 2315-16.

2. 5 Moore, op. cit. p. 2317.

may not be justified, yet a verdict may be set aside as contrary to the preponderance of the evidence upon the later and different motion.

It has taken approximately 11 weeks for plaintiffs to put in their case. Ex necessitatae, the treatment of the motions for directed verdict will not lend itself to the nice and compact discussions I usually favor in the disposition of matters of law.

To test the validity of these present motions, argued at length by counsel, a review of the paper file, pretrial discovery papers, and the long transcript of the testimony, as well as the exhibits, is required.[3]

Analysis of the plaintiffs' direct case, and questions posed by it, follow:

ONE

DOW CHEMICAL COMPANY: As defendant

Defendant Dow is charged with violation of 15 USC §1 (Sherman Act) by conspiring with defendant Pennsylvania Paste in the latter's attempt to "destroy plaintiffs' business and thereby preserve Pennsylvania Paste's dominant

3. Plaintiffs took 41 trial days; the transcript comes to over 4973 pages; and there were in excess of 426 exhibits offered and ruled upon.

position in the wet paste manufacturing business in the Philadelphia area."[4]

Defendant Dow is charged with violation of 15 USC §§ 13, 14, 15 (Robinson-Patnam Act) by treating plaintiffs differently with respect to prices and credit than it did competitors of plaintiff.

I. ANALYSIS

DOW'S MOTIVE. (A) No contention is made that defendant Dow felt obliged to conspire for fear of reprisals by Pennsylvania Paste. In the Statement of Contentions and in the opening address to the jury, plaintiffs apparently contended that Dow's sole motive for its acts was that "it was not in Dow's interest to have in existence enforceable patents covering" plaintiffs' new use of methylcellulose, "since the holder of such a patent, if he had adequate financial resources, could effectively limit the production of all cellulose base paste."[5]

Yet, plaintiffs have conceded that Dow should not have felt constrained at selling Methocel CAM to Reardon or United Wallpaper Companies,[6] competitors with

4. Statement of Contentions, p. 6.
5. Statement of Contentions, p. 10; Opening Address of Plaintiffs, p. 13.
6. Tr. p. 1473.

plaintiffs, and that, in fact, Dow was free to sell Methocel to any manufacturer to be made into a wallpaper paste with a non-infringing formula for its competitive product to Calico,[7] plaintiffs' cellulose base paste. Any alleged motive of Dow to protect its sales is thus negated--unless plaintiffs now contend that Dow, uninformed as to the law, unwisely feared plaintiffs' control of "all cellulose base paste."

At argument on this motion, plaintiffs added the claim that a shortage of supply of CAM existed and that Dow considered it in its interest to sell its "favored" customers, Reardon and United, rather than plaintiffs.[7a]

DOW'S ACTS. (A) Dow is charged with selling Methocel to plaintiffs' competitors (1) at lower prices, (2) on better credit terms, and (3) with faster deliveries.[8] The specificities follow:

1. Plaintiffs apparently agree that Dow sold Methocel CAM to plaintiffs' competitors and Methocel NF to plaintiffs. The price for the former product was lower than for the latter. Plaintiffs' real objection seems to be that they were not told of CAM's existence by Dow in a clear manner and that they were not encouraged to buy it.[9] Do plaintiffs maintain that it was

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7. Tr. p. 1819.
7a. Tr. p.
8. Statement of Contentions, p. 10; Opening Address, p. 12.
9. Tr. p. 798, 1515.

Dow's obligation to encourage them to buy a cheaper product? Or that it was Dow's obligation to tell plaintiffs what products their competitors were buying for the same purpose as plaintiffs bought NF?

2. Plaintiffs' first contact with Dow in 1951 came when they were already losing money on Nix-Size.[10] When Dow took plaintiffs off 30 days credit they owed approximately $700 to Dow.[11] Three checks of plaintiffs had not cleared the bank, due, they claim, to Dow's cashing them prior to the date they promised them.[12] Plaintiffs claim that Dow gave Reardon and United more than 30 days to pay their bills,[13] but admits that they, the plaintiffs, had no information as to those two companies' credit rating.[14] They maintain that Dow should have reached some equitable accomodation with plaintiffs, but do they maintain that Dow was legally bound to do so, or that failure to do so is evidence of being part of a conspiracy to drive plaintiffs out of business?

3. Plaintiffs maintain that Dow sold them in dribbles and that they were forced to wait for Methocel even at times when they were willing to pay cash for it.[15] As this charge, if true, is

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10. Tr. pp. 1547-1548.
11. Tr. pp. 845-846.
12. Tr. pp. 1025-1027.
13. Tr. p. 882.
14. Tr. p. 1651.
15. Tr. p. 831.

apparently the result of the first two claims, it may have no separate identity as an alleged overt act. It is not, for example, referred to in the Statement of Contentions.

(B) Dow is charged with favoring the Reardon Co. by suggesting to it that it use Methocel CAM, a suggestion not made to plaintiffs.[16]

1. I find no support in the record for this charge. There is evidence that Reardon used CAM, but I find none that they did so on the basis of information not given to plaintiffs.

(C) Dow is charged with advertising Methocel as a base for non-staining wallpaper paste without stating in the ads that plaintiffs had a pending patent application.[17]

1. Is this conceivably an overt act of conspiracy? Is Dow required to place such information, if true, in its ads? Particularly with reference to plaintiffs' concessions, as stated supra?

(D) Dow is charged with early in 1957 refusing to sell the plaintiffs on any terms.[18]

1. The only support I find for this

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16. Statement of Contentions, p. 10.
17. Statement of Contentions, pp. 10,11.
18. Statement of Contentions, p. 11.

in the record is the statement of an unidentified man in Dow's Camden office to plaintiffs' Dovberg on the telephone to that effect.[19] May the jury properly find from this alone that Dow refused to sell plaintiffs on any terms?

II. SUMMA OF DIRECT TESTIMONY RE DEFENDANT DOW CHEMICAL COMPANY

A. DOW'S ALLEGED KNOWLEDGE

1. Dow is charged with knowledge of plaintiffs' dependence on Dow's methylcellulose as a prime ingredient in plaintiffs' cellulose base paste.[20]

2. Dow is charged with knowledge "of Pennsylvania Paste's campaign to drive plaintiffs out of business and of the retailers' cooperation in that campaign" and allegedly "knowingly cooperated and thereby conspired with Pennsylvania Paste in its efforts to drive plaintiffs out of business."[21]

B. DOW'S ALLEGED OVERT ACTS

1. Dow sold Methocel to plaintiffs' competitors in the cellulose base paste field at lower prices and on better credit terms than those which Dow offered to plaintiffs.[22]

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19. Tr. p. 996.
20. Statement of Contentions, p. 9.
21. Statement of Contentions, p. 10.
22. Statement of Contentions, p. 10.

2. Dow favored the Reardon Company, a competitor of plaintiffs over the plaintiffs "by suggesting that the Reardon Company use as a base for its cellulose paste a cheaper form of Methocel, which product Dow did not suggest in manufacturing their paste."[23]

3. "Dow nationally advertised the use of Methocel as a base for a non-staining wallpaper paste without stating that, as Dow knew..., plaintiffs had a pending patent application (and later a patent) covering this use of that product."[24]

4. "[E]arly in 1957...Dow refused to sell plaintiffs Methocel on any terms."[25]

C. DIRECT TESTIMONY*

Beginning in the fall of 1951, plaintiffs marketed Calico, a cellulose base paste[26] on which a patent was granted in 1955.[27] The major advantage of such a paste over wheat flour or flour-base paste was that a cellulose paste leaves no stain on the wall and does not discolor the mixing water.[28]

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23. Statement of Contentions, p. 10.
24. Statement of Contentions, pp.10,11.
25. Statement of Contentions, p. 11
26. Tr. p. 683.
27. Tr. p. 684.
28. Tr. p. 684.

* All following direct testimony unless otherwise specified, is that of Maurice Dovberg for plaintiffs.

Plaintiffs initiated the relationship with Dow by writing to them on May 18, 1951.[29] They purchased on four occasions from Dow in 1951, seven times in 1952, eight times in 1953, eleven times in 1954, eight times in 1955, and once in 1956.[30]

Plaintiffs attempted to procure other cellulose compositions before they found Dow's product and throughout the period in which they purchased Methocel they were satisfied with it.[31] On only one occasion throughout this period of purchases did plaintiffs complain to Dow about the quality of such Methocel after it was delivered. After receiving a few complaints from their customer-users about the consistency of Calico paste, plaintiffs wrote to Dow on September 1, 1953.[32] Three paragraphs of the letter read:

> ***
>
> "I am urgently requesting prompt attention into the matter of why we get complaints from our distributors and some customers regarding the consistency of our Wallpaper Paste after being diluted.
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> ***
>
> "I urge you to take this matter up with your technical department, so that we can be assured that our

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29. Tr. p. 692.
30. Tr. p. 707.
31. Tr. p. 710.
32. Tr. p. 818.

> Raw Material will yield a consistent liquid mixture Uniform in every respect, so that these reports that we get will not occur again. It should be noted that such reports unless eliminated through proper precautionary means on your part, could hurt us very seriously.
>
> "I wish to assure you that our batches are weighed and Mixed Homogenously under very strict controls, so that this difficulty goes back to Dow Chemical Company and should be corrected at once."

One of plaintiffs' basic contentions is that they purchased Methocel NF for a higher price than their competitors purchased Methocel CAM, a comparable product for use in a cellulose base paste. Methocel CAM would have performed satisfactorily in Calico paste.[33] In November 1951, plaintiffs obtained a sample of Methocel CAM and performed an experiment on it; it performed exactly as had Methocel NF.[34] But plaintiffs knew nothing of Methocel CAM's commercial availability at that time. Indeed, at no time prior to receipt of Dow's price list of June 13, 1956, did plaintiffs know that Methocel CAM, which sold for as little as 69¢ a pound, was commercially available.[35] Throughout the period,

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33. Tr. p. 777.
34. Tr. p. 766.
35. Tr. p. 798.

plaintiffs paid at least a figure of 86¢ a pound. Dow sold Methocel CAM to Reardon and United Wallpaper Company, competitors of plaintiffs, at the lower price, while selling the more expensive form of Methocel NF to plaintiffs.[36]

A second basic contention of plaintiffs is that Dow mistreated them with regard to their credit relationship. From the time they began doing business with Dow until June 1953, Dow sold them solely on a cash basis[37] while plaintiffs were forced to sell to their customers on credit.[38] Plaintiffs obtained their national distributor, Arthur S. Hoyt & Co. for Calico paste in the spring of 1952,[39] and from then to the early part of 1953 was when Pennsylvania Paste Co. and Samuel Schultz & Co. marketed their cellulose products "in identical package" forms.[40]

On April 25, 1952, plaintiffs' Dovberg had a conversation with Mr. Pyron of Dow -- "I pleaded ... that he request Dow ... to give us some more consideration in this matter, that we needed more material, that I told him at the time that we were selling on credit. I requested credit at that time, but, at any rate, in spite of my appeal, he told me he would have to take it up with his

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36. Tr. pp. 799-804.
37. Tr. p. 820.
38. Tr. p. 820.
39. Tr. p. 821.
40. Tr. pp. 821-822.

home office and advise me."[41] On October 24, 1952, Dovberg had another conversation with Pyron.

> "...I pointed out to Mr. Pyron that we had acquired a volume of distribution, that Methocel was our principal and primary constituent in this wallpaper paste, in this product, that we were manufacturing, that we were manufacturing on a national scale, that I had applied for a patent that incorporated these two ingredients that Dow was selling us.
>
> "He registered surprise when I told him this. Our patents at that time were pending. He assured me that he would review this with his home office. He told me he would like to do whatever he could but that his hands were tied, and he also told me that he wasn't sure that his home office would do any better for us, because they had consistently decided that they were only going to sell us on a limited scale."

On June 19, 1953, Dow began to sell plaintiffs on 30 days credit.[42] Dovberg conversed with Pyron who told him Dow "isn't interested in selling me carload quantities, nor would they consider selling me truckload quantities, [30,000 or

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41. Tr. p. 823.
42. Tr. p. 828.

20,000 pounds] that I may as well continue to buy the way I am doing."[43]

Plaintiffs continued on 30-day credit until April 23, 1954.[44] During the period they purchased at 89¢ a pound; the carload or truckload price would have been 78¢ a pound. The limited credit policy constrained plaintiffs' activity and limited their ability to ship on time. The "Dow Chemical Company was holding us down, limiting our shipments. There were times when Methocel was critical, even when I was willing to pay for the quantity for cash or willing to pay before they would ship, and they would tell me that I would have to wait until a car would bring in a quantity into Philadelphia or until their shipment was replenished here in Philadelphia."[45]

In order to procure further Methocel plaintiffs had to ask Hoyt to pay them for Calico paste when plaintiffs still owed Hoyt money for dry paste purchases.[46]

Dow's inter-office memo of April 22, 1954 with respect to cutting off plaintiffs' credit stated that plaintiffs owed Dow $730.75. All moneys owed Dow were repaid.[47]

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43. Tr. p. 829.
44. Tr. p. 830.
45. Tr. p. 831.
46. Tr. p. 842.
47. Tr. pp. 845-846

In order to obtain cash to pay Dow, after being taken off a credit basis, plaintiffs began packaging their dry paste products themselves.[48] Throughout the period, plaintiffs' desire was for Dow to allow them to draw parts of carload and truckload lots, at equivalent prices, and in return to obligate themselves to eventually take a whole carload or truckload, etc.[49]

In the spring of 1954, plaintiffs' Dovberg told Mr. Pryon, of Dow, that Dow's cutting off his credit was "throttling our business";[50] that Calico and Nix-Size were plaintiffs' two big products, and that Dow was hurting them with respect to Calico at the same time Pennsylvania Paste Co. was hurting them with respect to Nix-Size. "I said ... [Pennsylvania Paste Co.] was reducing us, they were imitating our products. The owner of this company threatened to put us out of business, and that there were others who through this paste manufacturer were also hurting us, and this was taking a frightful toll of our business and reducing our cash. I pointed out to Mr. Pyron that if this condition continued and if Dow Chemical Company doesn't give us consideration that they would be contributing from an opposite direction to help this local paste manufacturer and those who were doing us serious harm to achieve for that company,

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48. Tr.p. 859.
49. Tr.p. 876-878
50. Tr.p. 879

for those others, the same purpose, to destroy our business, to put us out of business."[51]

Dow's cutting off plaintiffs' credit hurt at a critical time with respect to sales of Calico. In 1951, Dovberg sold $383.82 of Calico; in 1952 - $2471.00; in 1953 -$3414.00; in 1954 - $2593.65; in 1955 - $2237.10; in 1956 - $363.00.[52]

Throughout the period, Dow sold to United Wallpaper Co. and Reardon Wallpaper Co. on credit, was often not paid until over 30 days from date of delivery, and never cut off credit to those companies.[53]

Hoyt complained to plaintiffs' Dovberg about the latter's inability to send Calico and numerous orders were cancelled in 1954. Dovberg offered Hoyt a chance to buy $2000 worth of Calico in advance, to be drawn as Hoyt wanted it, and the offer was refused by Hoyt.[54]

Numerous orders from 1955 were cancelled because of plaintiffs' inability to supply Calico.[55] Numerous orders from 1956 were similarly cancelled.[56] Indeed, on only one occasion in 1956 was Dovberg able to buy from Dow.[57]

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51. Tr. p. 880
52. Tr. pp. 885-886.
53. Tr. p. 882.
54. Tr. pp. 888-907.
55. Tr. pp. 914-922.
56. Tr. pp. 926-932.
57. Tr. p. 932.

In September 1956, plaintiffs' Dovberg drove to Michigan for the purpose of speaking with the president of Dow Chemical Company, Dr. Doan.[58] He called Dr. Doan at his home on the telephone and told him he wished to speak with him personally.[59] After telling Dr. Doan of the urgent nature of his visit, "I told Dr. Doan that certain circumstances led to this and that there were others who had throttled my business, who had attempted to wreck my business and because of the persistent policies of Dow Chemical Company it appeared to me as though they were helping those to put me out of business and that if I couldn't effect some understanding between Dow Chemical Company and ourselves ... that I would lose my business and if that happened, I would be obliged to hold the Dow Chemical Company fully responsible."[60] Dr. Doan refused to speak with Dovberg personally and Dovberg returned to Philadelphia.[61]

On September 24, 1956 Dovberg wrote to Dr. Doan offering a sale of his patents for adhesives and paste or gum preparations.[62] The offer was rejected.[63] Soon after, desperate, plaintiffs' Dovberg proposed merger with Pennsylvania Paste,[64] which rejected it.[65]

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58. Tr. p. 956a
59. Tr. p. 960.
60. Tr. p. 961.
61. Tr. p. 962.
62. Tr. p. 963.
63. Tr. p. 986.
64. Tr. p. 987.
65. Tr. p. 988.

About October 23, 1956 plaintiffs' Dovberg had a meeting in his factory with Mr. Grow of Dow.[66] He told Grow of Pennsylvania Paste's conspiracy and that "from opposite directions" Dow was helping to effectuate the same policy.[67] He told Grow of his wish for credit from Dow and for local agency rights to Methylcellulose.[68] On November 16, 1956, Dovberg received a letter from Dow denying all charges and saying there was nothing they could do for him.

In the spring of 1957, plaintiffs' Dovberg called the office of the manager of the Camden sales office of Dow. He spoke with someone there and was told that Dow didn't wish to do any business with him.[69] Any business plaintiffs would have done with Dow would have had to be on credit at the quantity price.[70] Plaintiffs attempted to buy Methocel on credit from Philips & Jacobs Co., but after speaking with Dow, Philips & Jacobs Co. refused to sell to plaintiffs on credit.[71]

Plaintiffs shut their factory late in 1957.[72]

On February 21, 1958, Mr. Widua of Dow wrote a letter detailing plaintiffs'

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66. Tr. p. 989.
67. Tr. p. 990.
68. Tr. p. 991.
69. Tr. p. 996.
70. Tr. p. 998.
71. Tr. p. 1016.
72. Tr. p. 1011.

Dovberg's complaints to Dow's home office.[73]

In the whole of plaintiffs' relationship with Dow, three checks of the former did not clear. Plaintiffs' Dovberg had been promised by Mr. Pyron that they would not be cashed until a later date, but all were cashed earlier than the promised date. Plaintiffs speedily paid them back and made good on the obligation.[74]

Plaintiffs received a letter dated April 14, 1958 from Dow denying all charges.[75] The letter concluded with an offer to plaintiffs to answer it and "present any additional facts of which you are aware which might allow us to clarify this matter."[76] But plaintiffs' Dovberg, out of business and distrustful of Dow's intent, did not reply.[77] Suit was instituted against Dow in September 1958.[78]

D. CLARIFICATION OF DOW'S ACTS ON THE CROSS EXAMINATION

There is no contention that Dow should not have sold Methocel CAM or any other type Methocel to United Wallpaper, Reardon, or anybody else[79] or that Dow should not have sold Methocel to any

73. Tr. pp. 1022-24, 1027-29.
74. Tr. pp. 1025-27.
75. Tr. pp. 1030-37.
76. Tr. p. 1037.
77. Tr. p. 1037, but see, infra, footnote 102a.
78. Tr. p. 1037.
79. Tr. p. 1473.

wallpaper paste manufacturer to be made into a wallpaper paste with any formula which did not infringe on Dovberg's Calico patent.[80] The Calico patent itself refers not to Methocel (Dow's product), but to methylcellulose.[81]

The difference in cost between Methocel purchased by plaintiffs in 1951 and Methocel CAM was approximately $100.[82]

After plaintiffs obtained a sample of Methocel CAM, plaintiffs' Dovberg tested it and it worked satisfactorily, but no one talked price to him or told him how he could make any saving on it, and so he ordered none of it.[83]

Cellu-Stick, Pennsylvania Paste's product, was never analyzed by plaintiffs; nor was United Wallpaper's "Nancy Warren"; nor was Reardon's Supercel[84] to determine what type methylcellulose was in them. Plaintiffs knew nothing of the cost of production to any of the three manufacturers.[85] Dovberg made no inquiry as to what source the manufacturers of 15 to 20 other pastes got their methylcellulose or other such product from. Competition, originally from Cellu-Stick and then from the others,

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80. Tr. p. 1819.
81. Tr. p. 1503.
82. Tr. p. 1501a.
83. Tr. p. 1515, 1516.
84. Tr. pp. 1517, 1518, 1519.
85. Tr. pp. 1524-1530.

forced plaintiffs to reduce their price for Calico from 47¢ to 33¢ and then even lower.[86]

When plaintiffs first wrote Dow with respect to shipments of Methocel in 1951, they had already lost money in 1950 and 1951 on Nix-Size.[87]

Plaintiffs never gave Mr. Pyron a financial statement,[88] nor did they give requested business information to Dun & Bradstreet.[89] Plaintiffs' Dovberg sent Arthur S. Hoyt & Co. one financial statement, but a letter from Hoyt of October 29, 1952 comments that Dovberg's statement was neither signed, nor up to date, nor accurate.[90] Dovberg never sent another one[91] despite frequent requests from Hoyt. By July 29, 1954, plaintiffs had no intention to send Hoyt any financial statement, though asked to do so?[92] Plaintiffs continued behind in payments to Hoyt throughout 1954 and 1955[93] and on at least one occasion a check sent to Hoyt failed to clear.[94]

At the time Dow cut off plaintiffs' credit, three bills were outstanding totalling approximately $700. One was

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86. Tr. p. 1520.
87. Tr. pp. 1547, 1548.
88. Tr. p. 1599.
89. Tr. p. 1604.
90. Tr. p. 1676.
91. Tr. p. 1681.
92. Tr. p. 1789.
93. Tr. p. 1797.
94. Tr. p. 1737.

more than 30 days outstanding; one approximately 60 days, and the other more than 60 days.[95] One of the three invoices was paid about 4 months after due date; the other two about 3 months.[96]

The highest amount ever loaned plaintiffs by a bank at any time was $2650[97] and the bank credit generally was for $2000 at a time.[98] At the same time plaintiffs were seeking to get credit from Dow, Hoyt was requesting payment from plaintiffs for amounts owed it.[99] Plaintiffs' Dovberg finally made an arrangement (after the latter had rejected plaintiffs' overture to finance them up to $2000 at a time) that when Hoyt sent plaintiffs an order it would precede the order by a check so that plaintiffs could buy raw materials.[100]

Plaintiffs' Dovberg has no information with respect to the credit standing of United Wallpaper or Reardon Co.[101] He does not know what the mark-up was that Philips & Jacobs quoted to him.[102]

Plaintiffs' Dovberg did reply to Dow's letter of April 14, 1958. On June 9, 1958, Dovberg wrote to Mr. W. R.

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95. Tr. p. 1624.
96. Tr. p. 1626.
97. Tr. p. 1643.
98. Tr. p. 1833.
99. Tr. p. 1649.
100. Tr. p. 1703.
101. Tr. p. 1651.
102. Tr. p. 1855.

Dixon, the General Sales Manager of Dow, and complained once more of Dow's activities.[102a] The letter said in part:

> "Your investigation should also have disclosed that, after certain of our competitors commenced their non-licensed manufacture of our Paste Products, Dow consistently furnished certain of our competitors with Methycellulose at prices which were lower, and on credit terms which were better, than those which Dow offered us, and that Dow finally refused to sell us any Methycellulose whatever. Your investigation should have also disclosed that these actions by Dow, together with those of our unfair competitors, finally forced Paste Company of America and Dovberg Chemical Company to cease doing business in the Spring of 1957, despite the fact that we then had a substantial volume of unfilled orders.
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> ***
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> "I believe, Mr. Dixon, that your letter, with its distorted and - in certain instances - untrue recitals of fact was not written for any bona fide purpose, but in the hope that, should I fail to answer it, Dow would point to my silence as an indication of the accuracy of your recital. Since it is perfectly clear,

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102a. Tr. p. 1867; DX-Dow 79.

that nothing can be gained by further meetings or correspondence, I have just referred this matter to our attorneys."

Dovberg made no mention of Methocel CAM in the letter of June 9, 1958.

E. RE-DIRECT AND RE-CROSS EXAMINATION, etc.

In 1952 plaintiffs' Dovberg made various changes in the formula he used for Calico paste and no longer manufactured according to the patented formula.[103] The reason plaintiffs didn't borrow $20,000 or whatever amount was necessary to obtain a carload or truckload of Methocel from Dow was that the bank would not loan plaintiffs such a large amount and, according to Dovberg, Dow wanted plaintiffs as a small rather than a large customer.[104]

Between February 1, 1951 and June 21, 1954, plaintiffs purchased on credit 43 times from Arthur S. Hoyt & Co., and made good on all such obligations.[105]

In January 1951 plaintiffs sent to Hoyt a complete and accurate financial statement as to the original state of the company business.[106] The reason one was not sent after that was that the business was "beset by great difficulties as the

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103. Tr. p. 1924.
104. Tr. p. 1978.
105. Tr. p. 1993.
106. Tr. p. 2017.

result of what these defendants did ... and ... I was reluctant to give out any statement" which would show how low in cash the business was.[107]

It is apparently stipulated by Dow that two portions of Methocel CAM is required to give the same result as one portion of Methocel NF.[108]

Plaintiffs did not buy Hercules CMC (utilized in Pennsylvania Paste Company's Cellu-Stick) because they did not want the salt content in it. They did not know the price of CMC[109] nor whether it was available without salt.[110] They did not know the percentage of salt in the CMC product of Pennsylvania Paste Company compared to Calico.[111]

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107. Tr. p. 2017.
108. Tr. pp. 2169, 2170.
109. Tr. p. 2269.
110. Tr. p. 2270.
111. Tr. p. 2271.

TWO

PENNSYLVANIA PASTE COMPANY: Another defendant

Pennsylvania Paste is charged with violation of 15 USC §1 (Sherman Act) by conspiring with the other defendants to destroy plaintiffs' business "and thereby preserve Pennsylvania Paste's dominant position in the wet paste manufacturing business in the Philadelphia area."

Pennsylvania Paste is charged with violation of 15 USC §2 (Sherman Act) in its attempt to maintain its "dominant position in the wet paste manufacturing business in the Philadelphia area."

I. ANALYSIS

A. THE OVERT ACTS

1. Pennsylvania Paste is charged with marketing Liqui-Size, "a wall size eliminator, whose form, composition and packaging were in imitation of plaintiffs' Nix-Size."[112] Extensive direct evidence was introduced to prove Pennsylvania Paste's intent to make an imitation of Nix-Size and that Liqui-Size was in fact such an imitation.[113]

2. Pennsylvania Paste is charged with distributing wholesale a non-staining cellulose paste "whose form, composition and packaging" were similar to those

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112. Statement of Contentions, p. 7.
113. Tr. pp. 244, 247, 426.

of plaintiffs' Calico Paste.[114] At a later point in the trial, however, plaintiffs conceded that the Cellu-Stick product, its manufacture and sale, was not alleged to be an overt act to prove the alleged conspiracy.[115]

3. Pennsylvania Paste is charged with marketing Liqui-Size at prices sometimes below cost for the "primary purpose of causing loss" to plaintiffs.[116] Extensive expert testimony was given in support of this charge by plaintiffs' Dovberg as to costs of manufacture.[117]

4. Pennsylvania Paste is charged with inducing retailers to cease purchasing plaintiffs' products by "threatening to deprive them of their source of supply of wet paste" as soon as plaintiffs were forced out of business, and of engaging in a campaign to "destroy the confidence of retailers in plaintiffs and their products" by spreading false rumors about the inadequacy of the products and of the likelihood of plaintiffs being forced out of business.[118] Extensive testimony was given by plaintiffs' Dovberg in support of these charges.[119] While the great bulk of it was hearsay, there does appear to be a modicum of direct

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114. Statement of Contentions, p. 7.
115. Tr. p. 2573.
116. Statement of Contentions, p. 7.
117. See Tr. pp. 267, 357-364, 384-396, 396-406, 409-412, 423, 439-442, 3528-3541, 3616 et seq., 3667 et seq.
118. Statement of Contentions, pp.7, 8.
119. Tr. pp. 289-353, 414-421.

testimony admitted to raise a substantial issue of fact as to the truth of the allegation.

II. SUMMA OF TESTIMONY RE DEFENDANT PENNSYLVANIA PASTE COMPANY

A. THE CHARGE

(A) "Plaintiffs' basic contention of law is that Pennsylvania Paste conspired with the other defendants to destroy plaintiffs' business ..."[120]

(B) " ... and thereby preserve Pennsylvania Paste's dominant position in the wet paste manufacturing business in the Philadelphia area."[121]

B. DIRECT TESTIMONY

1. Wet Paste Products

Plaintiffs began putting wet paste products on the market in 1950. Deliveries were made in butter tubs on a deposit basis, but plaintiffs found consistently that the empty tubs were not at their customers' places to pick up. Plaintiffs' Dovberg received reports from his customers as to why they weren't there[122] and he called Flanagan (of Pennsylvania Paste) on the phone on

120. Statement of Contentions, p. 6.
121. Statement of Contentions, p. 6.
122. Tr. p. 230.

September 12, 1950.[123] In the phone call, he "told Mr. Flanagan that when I call on dealers I find that our paste tubs are disappearing and that I am being told that his drivers are picking them up, and I asked Mr. Flanagan to see to it that this condition ceased."[124] Flanagan denied the charge.

On November 7, 1950, plaintiffs made their first purchase of fiber drums to replace the butter tubs in which they had been delivering wet paste. Pennsylvania Paste Company quickly followed suit and Dovberg observed fiber drums being used by Pennsylvania Paste for their deliveries on December 10.[125] Each fiber drum cost $1 and plaintiffs would return 35¢ on each drum returned by his customers.[126] As with the butter tubs, the fiber drums were not returned and in the spring of 1951[127] he called Flanagan on the phone to report to him what he had heard about the loss of the drums. Out of 50 tubs that plaintiffs owned, 2 broke after normal usage.[128] Flanagan denied his drivers were taking the drums. Dovberg went to Flanagan's factory, looked inside, and saw Pennsylvania Paste fiber drums[129] beside "our fiber drums clearly marked and identified"[130] and

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123. Tr. p. 231.
124. Tr. p. 231.
125. Tr. p. 248.
126. Tr. p. 235.
127. Tr. p. 236.
128. Tr. p. 2935.
129. Tr. pp. 237, 2939.
130. Tr. p. 235.

butter tubs which belonged to plaintiffs.

Plaintiffs, unable to take further losses on the fiber drums, were soon forced to discontinue sales of wet paste products [131] by March 1951.[132]

2. Nix-Size

On September 12, 1950, Dovberg had a telephone conversation with Flanagan[133] "I told Mr. Flanagan[134] that I had reports that he had analyzed our Nix-Size ... and that he was planning to come out on the market with a similar product. During this conversation, Mr. Flanagan said, 'I understand that you people are manufacturing ... wet paste ... I would sooner drop dead on the street than lose one customer to you people ...' He also stated that as long as we continued to manufacture paste, he was determined to imitate any product that we manufactured and put on the market, that he could reduplicate and manufacture any product that we make as our product, he could afford to out produce us, undersell us, even continue to suffer losses until such time as he would put us out of business and then he could recover ... that he had the production capacity,[135] that he had the money, and that he would put an end to us and put us out of business."

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131. Tr. p. 238.
132. Tr. p. 2433.
133. Tr. p. 241.
134. Tr. p. 243.
135. Tr. p. 243a.

On October 20, 1950 Dovberg noted that Flanagan had entered the market with Liqui-Size, a competing product to plaintiffs' Nix-Size.[136] Dovberg procured a sample and brought it to Usona Bio-Chem Laboratories to have it analyzed[137] without telling the chemist it was Liqui-Size.[138] From its entry into the market, Liqui-Size looked like Nix-Size.[139] Nix-Size was being sold in pints and quarts and Liqui-Size in pint bottles.[140] Directions on both bottles were similar as to how much eliminator to add to obtain the same result.[141] Liqui-Size was sold in a flat flask-like bottle; Nix-Size in a Boston amber brown bottle.[142]

On December 20, 1950, Dovberg sent to Flanagan, by registered mail, a letter, of which he has the return receipt;[143] the first four paragraphs read:

> "As the beginning of a new year approaches, I wish to remind you that on September 12 and October 19th this year, I called you on the telephone and appealed to you to permit us to carry on our Business, by acting on friendly and fair competitive means.

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136. Tr. p. 244.
137. Tr. p. 245.
138. Tr. p. 246.
139. Tr. p. 247.
140. Tr. p. 247.
141. Tr. p. 248.
142. Tr. p. 247.
143. Tr. p. 261.

These telephone calls were prompted by the fact that I am well familiar with your ruthless tactics and unscrupulous tactics which has been put forth for years against small paste company's like ourselves.

"Thus far, your tactics have not changed. Your actions against any small Paste Company have always been just what your game is to-Day. Only last September you told me over the telephone that your proposed soon, to manufacture anything similar in product or Container that the Paste Company of America has on the Market. To be honest, I didn't believe you until in October you proved that you were very sincere.

"First you followed us with similar fibre - Paste Containers retaining the same non-profit quotation as for the wooden tub of paste, knowingly - that the fibre container holds 1 1/2 quarts paste more than the tub. This quotation not only prevents us from using the fibre drum, since we cannot compete to lose, but it is also impairing our business.

"I also regret, that after having Nix-Size annalized, you placed on the marked Liqui-Size, which is the closest resemblance to Nix-Size that I Know. And - to top off this Diabolicol act, you Personally solicited Liqui-Size, Promoting it as 'just like Nix-Size.' This inexcusable tactic, promoted with Free-Givaways and sold

at a lesser price than Nix-Size - Has already taken its Toll. Not only do you dare to infringe but you are tempted to destroy the original product which prompted you to seek the ways and means to reduplicate it."

No reply of any sort was ever received to the letter.[144]

Until Liqui-Size was sold on the market, plaintiffs sold Nix-Size for $4.20 a dozen and $4 a dozen to dealers when they bought one gross or more.[145] Pennsylvania Paste's Liqui-Size commenced to sell for $3.75 a dozen. On March 9, 1951 it was reduced to $3.50 a dozen, with a 10% discount on gross purchases[146] and such price continued through 1952.[147] Nix-Size sales fell off.[148] Ten examples of such cessation follow:

(a) Modern Wallpaper Company, which had twice purchased Nix-Size, ceased further purchases and the store manager told Dovberg that "he gets favors from Mr. Flanagan and that he could not say no to him."[149]

(b) The Philadelphia Wallpaper Company was a frequent purchaser of Nix-Size.[150] On December 4, 1950

144. Tr. p. 266.
145. Tr. p. 267.
146. Tr. p. 412.
147. Tr. pp. 378, 379.
148. Tr. p. 269.
149. Tr. p. 289.
150. Tr. pp. 294, 296, 299, 300.

Dovberg was told by one of their salesmen that Pennsylvania Paste Company had told them that "they had an exact duplication of Nix-Size,[151] and that the Pennsylvania Paste Company had loaded them up with a supply and requested that if anybody asked for Nix-Size to sell this as Nix-Size." After this conversation, sales to the Philadelphia Wallpaper Company dwindled[152] and soon ceased.[153] On June 18, 1951 Dovberg had a conversation with the manager of the Camden store of Philadelphia Wallpaper Company, in which the latter said "the owners of Pennsylvania Paste Company gives me money to push his product."[154]

(c) Southwest Wallpaper Company was a frequent purchaser of Nix-Size[155] throughout 1950. On July 8, 1951, Dovberg wrote a memo stating: "The owners of Southwest Wallpaper Company told me today that Pennsylvania Paste Company is making the exact thing as Nix-Size for us, under our own label. We are not going to buy Nix-Size after this order."[156] No order was placed after this[157] and Southwest began to sell Liqui-Size.[158]

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151. Tr. p. 303.
152. Tr. pp. 303, 304.
153. Tr. p. 308.
154. Tr. p. 308.
155. Tr. pp. 309, 318.
156. Tr. p. 314.
157. Tr. p. 315.
158. Tr. p. 316.

(d) Crown Wallpaper Company purchased in 1949 and 1950 from plaintiffs.[159] In December 1950, Max Forman, the owner of Crown, told Dovberg that "Mr. Flanagan was in to see him and asked him not to handle our products, that he would let him have his Liqui-Size for less, that it was the same thing as Nix-Size. After this conversation, purchases dwindled, then ceased.[160]

(e) Cohen Brothers Paint & Wallpaper Company purchased Nix-Size in 1950 and 1951.[161] Dovberg was forced to lower the price to compete with Liqui-Size[162] and had a conversation with the owners in which they "urged me to try to sell them for the same price as Pennsylvania Paste was charging or else they would have to discontinue buying."[163] After the conversation, only one more purchase was made of Nix-Size before complete cessation of buying, and Dovberg observed that Cohen Brothers sold Liqui-Size.[164]

(f) Albert's Wallpaper Co. did business with Dovberg in 1950.[165] Dovberg was told by the owners on March 28, 1950 of rumors that Pennsylvania Paste Co. was "going to put us out of business if we didn't stop selling wet paste."[166] On November 28, 1950,

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159. Tr. pp. 315-320.
160. Tr. p. 324.
161. Tr. p. 325.
162. Tr. p. 325.
163. Tr. p. 327.
164. Tr. p. 328.
165. Tr. p. 328.
166. Tr. p. 329, 330.

Dovberg was told by the proprietor "that Mr. Flanagan[167] called him and told him that he would sell .... Liqui-Size on open terms and that he could deliver as much as he wanted. Albert also said that Mr. Flanagan ... would put us out of business if we continued to ... manufacture and sell wet paste." Sales to Albert's slumped in 1952 to 8 cases of Nix-Size from 27 the year before, and 23 the year before that.[168] On December 9, 1952 Dovberg noted Liqui-Size on sale at Albert's store. He remarked on this to Albert, and Albert said, "Oh, Pennsylvania Paste Company's owner was around here and left this free of charge. They just left Liqui-Size and said go ahead and sell it, it is the same thing as Nix-Size, and the proceeds of these sales you can keep."[169] Sales slumped in 1953 to 4 1/2 cases, then ceased in 1954[170] with a final purchase by Albert on November 15. Liqui-Size continued to be sold in Albert's store.[171]

(g) J. Levitas Wallpaper Co. purchased from Dovberg in 1950-51.[172] Dovberg had a conversation with them in March 1952 and was threatened with a cessation of all purchases and subsequent purchases only of Liqui-Size, unless a price cut was made in Nix-Size.[173]

167. Tr. p. 333.
168. Tr. p. 337.
169. Tr. p. 339.
170. Tr. p. 343.
171. Tr. p. 343.
172. Tr. p. 345.
173. Tr. p. 347.

Morris Levitas told him that Pennsylvania Paste had left Liqui-Size for free "and told him to sell that in preference to Nix-Size, that not only would he sell it to them for less, but it would afford them a more substantial profit." Flanagan was further reported to have told them not to buy "our paste, that most of the stores don't like our paste, and that they ought to buy from Pennsylvania Paste Company."[174] Sales dwindled through 1953-54 and ceased in 1955.

(h) Ivry Wallpaper Co. purchased Nix-Size in 1949[176] and 1950.[177] In March 1951, Dovberg had a conversation with Milt Ivry, the proprietor, with respect to Liqui-Size on sale in Ivry's store. Ivry said, "Pennsylvania Paste Company left it here and told me to push it. It's the same thing as Nix-Size, and I can get it from Pennsylvania Paste Company cheaper."[178] Orders dwindled.[179] On October 6, 1951, Mrs. Ivry told Dovberg that Flanagan had attempted to convince them to cease buying Nix-Size, "that he assured them that he had the same thing, that he could sell it to them cheaper."[180] Plaintiffs were forced to cut their price and even with a price cut Ivry purchased less and then ceased purchasing Nix-Size, after which it continued to sell Liqui-Size.[181]

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174. Tr. p. 347.
175. Tr. p. 348.
176. Tr. p. 349.
177. Tr. p. 350.
178. Tr. p. 351.
179. Tr. p. 351.
180. Tr. p. 352.
181. Tr. pp. 353, 352.

(i) Square Deal Wallpaper & Paint Company was a customer of Dovberg in 1950-51. On March 7, 1951, Eddie Spivak, of Square Deal, told Dovberg that Pennsylvania Paste's Flanagan had been in to see him and had told him that Nix-Size "wasn't any good."[182] After that conversation, Dovberg was forced to cut his price on Nix-Size to Square Deal. On November 5, 1951, Dovberg made a delivery to Square Deal and Spivak told him that Pennsylvania Paste's drivers were spreading rumors that Dovberg was going out of business.[183] Soon after February 1955 Spivak told Dovberg that Flanagan had told him that "we would be out of business soon, that he ought to buy his products if he intended to continue to get his products after we were out of business."[184] Spivak at that time complained about Dovberg's prices and Dovberg had to cut it.[185] Following a delivery of Nix-Size in March, 1955, Spivak called Dovberg and told him he could get the same thing from Pennsylvania Paste for $2.70 a dozen. "He said Mr. Flanagan told him this is exactly the same thing, 'so why should I pay your company more when I can get the same thing from him for less.'"[186]

(j) Other companies that referred to the rumors about plaintiffs

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182. Tr. p. 416.
183. Tr. p. 414.
184. Tr. p. 419.
185. Tr. pp. 420-421.
186. Tr. p. 421.

going out of business were the Charles Wallpaper Company, Reliable Wallpaper Company and Stein Wallpaper Company.[187]

By the spring of 1952 there had been increases in the prices of raw materials and packaging items, and plaintiffs attempted to raise prices.[188] They were unable to effect the increase, as customers stated that Pennsylvania Paste's Flanagan had stated that he would not raise his price.[189]

In the spring of 1952 as well, Pennsylvania Paste changed its package of Liqui-Size to a Boston amber round bottle, quite similar to that of Nix-Size, and with essentially the same directions and instructions.[190]

On September 12, 1952, Dovberg wrote a letter to defendant Pennsylvania Paste, of which he has the return receipt.[191] The letter accused Pennsylvania Paste of copying plaintiffs' bottle and seeking to put them out of business.[192] At no time did plaintiffs receive any reply to the letter.[193] On March 11, 1955, Dovberg wrote a final letter to Flanagan, accusing him of "unfair business practices" and asking him once again to stop producing an imitation of Nix-Size.[194] He received no

187. Tr. p. 322.
188. Tr. pp. 423, 424.
189. Tr. p. 425.
190. Tr. p. 426.
191. Tr. p. 428.
192. Tr. pp. 429, 430, 431.
193. Tr. pp. 428-435.
194. Tr. p. 436.

reply to the letter.

At no time throughout the whole period involved in this case did plaintiffs receive any complaints from outside the Philadelphia area of their price for Nix-Size. Such complaints as were received were all in the Philadelphia area.[195]

3. Cellulose Based Paste

Late in 1951, plaintiffs began to market Calico Paste, a cellulose based paste. At that time Pennsylvania Paste Company had no such product on the market. In January 1952, Pennsylvania Paste put a competitive produce, Cellu-Stick, on the market;[196] package sizes of Cellu-Stick were similar[197] to that of Calico and its effect was to lessen Calico sales.

4. Costs of Production*

Plaintiffs paid approximately the same price as Pennsylvania Paste did for all items that went into Nix-Size. They bought caps, bottles, cello-seal

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* The extensive cross examination that was conducted on the issue of cost of production will not be considered here, as most of it is not relevant to the determination of the motions herein considered.

195. Tr. p. 453.
196. Tr. p. 451.
197. Tr. p. 452.

bands, for approximately the same price or less than Pennsylvania Paste.[198] Pennsylvania Paste purchased phenol for approximately the same price, and paid approximately the same amount for the filler substances in the formula.[199] The chemical formulae and compositions of Nix-Size and Liqui-Size are virtually the same.[200]

Sales of Nix-Size and Liqui-Size throughout the period involved were similar:

In 1950, Nix-Size sold $7,838.21;[201] Liqui-Size, $1,240.75.[202]

1951: Nix-Size, $13,028.58;
Liqui-Size, $5,113.66.
1952: Nix-Size, $7,461.77;
Liqui-Size, $7,332.82.
1953: Nix-Size, $7,716.84;
Liqui-Size, $5,425.95.[203]

1954: Nix-Size, $6,075.47;
Liqui-Size, $4,950.96.
1955: Nix-Size, $4,744.89;
Liqui-Size, $5,193.57.
1956: Nix-Size, $2,962.77;
Liqui-Size, $4,912.23.[204]

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198. Tr. p. 382.
199. Tr. pp. 384-396.
200. Tr. pp. 357-364.
201. Tr. p. 396.
202. Tr. p. 397.
203. Tr. pp. 397, 398.
204. Tr. p. 398.

Plaintiffs had fewer employees than Pennsylvania Paste.[205]

Plaintiffs' machinery was similar to that of Pennsylvania Paste.[206]

Both firms used a hand process to cap their products.[207]

Both used a hand process to put a cello-seal band around the top of the bottle.[208]

Both labelled the bottles by hand.[209]

Both had similar elevator conveyor systems.[210]

Both had similar boiler facilities.[211]

Both had the same amount of trucks.[212]

Plaintiffs paid no rent;[213] Pennsylvania Paste paid rent.[214]

Office expenses for plaintiffs were as low, or lower, than they could have

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205. Tr. pp. 399-401.
206. Tr. p. 401.
207. Tr. p. 402.
208. Tr. p. 403.
209. Tr. p. 403.
210. Tr. p. 404.
211. Tr. p. 404.
212. Tr. p. 406.
213. Tr. p. 405.
214. Tr. p. 406.

been for Pennsylvania Paste, since most of the office work was done for no salaries by Dovberg and his father alone.[215]

In 1951, Pennsylvania Paste's prices went down to $3.20 a dozen for gross purchases, and $3.50 a dozen for less than gross purchases. In November 1953, Pennsylvania Paste once again lowered the price to $3.00 a dozen, where as prices for ingredients, bottles, caps, and the like had remained the same or increased.[216] Salaries and expenses had increased.[217] A net profit was made by Pennsylvania Paste in 1952 on Liqui-Size; a loss was suffered in 1953 on Liqui-Size; a greater loss was suffered in 1954 on Liqui-Size. Throughout the period, Pennsylvania Paste kept its price the same while costs remained constant or increased.[218]

On the basis of this information and his knowledge of the trade, plaintiffs' Dovberg is convinced that Pennsylvania Paste sold his product for lower than cost in 1951,[219] and subsequent to that year.

In this period of time, other competitive products appeared, but none had a major part of the market or closely resembled Nix-Size until plaintiffs were on the verge of being forced out of business.[220]

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215. Tr. pp. 409-411.
216. Tr. pp. 439, 440.
217. Tr. p. 441.
218. Tr. p. 442.
219. Tr. p. 442.
220. Tr. p. 447.

5. Stipulations

There is no contention that Pennsylvania Paste imitated or impersonated wet paste products of plaintiffs.[221] There is no contention that Pennsylvania Paste imitated or impersonated dry paste products of plaintiffs.[222] There is no contention that Pennsylvania Paste attempted to monopolize cellulose based products.[223] The Cellu-Stick product, its manufacture and sale, is not alleged to be an overt act to prove the alleged conspiracy.[224]

There is no contention that the Liqui-Size label as such was copied from the Nix-Size label as such.[225] There is no contention that any sales of wet paste products, dry paste products, or non-staining cellulose products, by Pennsylvania Paste were for less than the cost of manufacture.

6. Miscellaneous Information

There were approximately five telephone calls between plaintiffs' Dovberg and Pennsylvania Paste's Flanagan. On September 12, 1950 Dovberg protested the possible release of a competitive product to Nix-Size; on October 19 and again in December, 1950, Dovberg protested the loss of his fiber drums. An additional call was made in the later

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221. Tr. p. 2252.
222. Tr. p. 2558.
223. Tr. p. 2575.
224. Tr. p. 2573.
225. Tr. p. 2816.

1950--early 1951 period, and in 1956 Dovberg called Flanagan to propose partnership.[226]

Flanagan visited plaintiffs' factory in the spring or summer of 1950,[227] and once again in the fall of 1950.[228] At both times, he identified himself as a representative of the Philadelphia Electric Company and asked various questions about Dovberg's business.

Dovberg had samples of Liqui-Size before October 12, 1950.[229]

There were other wall size eliminators on the market after Nix-Size and before Liqui-Size.[230]

Nix-Size sold as early as March 1950 on a fair-traded basis to the public at 65¢ per pint and to the trade at 50¢ per pint.[231] In March 1952[232] the price was increased to 85¢ per pint. This was the period in which Dovberg attempted to effect a general price increase.[233] Throughout the October 1950 to 1952 period, Liqui-Size was sold without a fair-traded price restriction;[234] plaintiffs kept Nix-Size fair-traded, at least to some customers[235] through 1954.[236]

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226. Tr. p. 2379.
227. Tr. p. 2363.
228. Tr. p. 2374.
229. Tr. p. 2395.
230. Tr. p. 2695, et seq.
231. Tr. p. 2843.
232. Tr. p. 2845.
233. Tr. p. 3010.
234. Tr. p. 2847
235. Tr. p. 3026.
236. Tr. p. 3025.

THREE

SAMUEL SCHULTZ & CO.: Another defendant

I. ANALYSIS

A. THE CHARGES

1. Schultz is charged with "discontinuing and refusing to resume ... [his] purchases of wall size eliminator" from plaintiffs, "with knowledge of Pennsylvania Paste's intent" to drive plaintiffs out of business.[237]

Evidence has been introduced of Schultz' discontinuance of purchases from plaintiffs and his refusal to resume purchases.[238] Evidence has also been introduced to the effect that plaintiffs' Dovberg told Schultz of Pennsylvania Paste's alleged intent and that Schultz was aware of it.[239]

2. Schultz is charged with having "induced United Wallpaper Co. to imitate and sell an imitation of plaintiffs' cellulose paste."[240]

Evidence has been introduced that plaintiffs' Dovberg demonstrated Calico

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237. Statement of Contentions, p. 8.
238. Tr. pp. 549, 541, 501.
239. Tr. pp. 475, 550, 552, 553.
240. Statement of Contentions, p. 9.

to the wallpaper trade, one of the largest in the Philadelphia area.[245] It claims by advertisement to be the largest wallpaper and paint store in the Philadelphia area.[246] Everywhere plaintiffs' Dovberg went, almost all of his customers had Samuel Schultz' line, his sample books, and his stock.[247]

Schultz purchased from plaintiffs from 1949 to 1952[248] and was one of Dovberg's biggest and best customers.[249] In 1949, Dovberg visited Schultz at his office and told him he was the inventor of Nix-Size.[250] Schultz began purchasing Nix-Size in 1949.[251] Plaintiffs' total sales of Nix-Size in 1950 were $7,828.21.[252] [This figure covers the period from June through the end of the year.][253] Plaintiffs' volume of sales in all of 1950 with Samuel Schultz & Co. was $2,232.60.[254]

About August 11, 1950, plaintiffs began to charge Schultz the distributor's price.[255] Such price for Nix-Size was $42 a gross, Schultz being allowed "the usual discount on the gross price purchase, an additional 10% discount and a bonus, a fractional bonus plus his 2% discount."[256]

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245. Tr. p. 463.
246. Tr. p. 460, PX 99.
247. Tr. pp. 463-464.
248. Tr. p. 464.
249. Tr. p. 465.
250. Tr. p. 470.
251. Tr. pp. 471-472.
252. Tr. p. 465.
253. Tr. p. 466.
254. Tr.p.469.
255. Tr.p.487.
256. Tr.p.490-491.

Late in 1950[257] plaintiffs received complaints from the National Paint & Wallpaper Company, Mr. Lebowitz, Ralph Schultz, Castle Wallpaper, and Greenstein Wallpaper[258] that Samuel Schultz was selling Nix-Size for 25¢ and 35¢ a pint,[259] although the product was fair-traded for 65¢ a pint.[260] Plaintiffs' Dovberg complained to Schultz, told him plaintiffs were receiving complaints, "that these complaints were generating bad feeling among our customers in the stores, and that they were asking me to cut our prices ... so that they could compete against Sam Schultz ..."[261] Sam Schultz said, "I buy your Nix-Size, I pay for it, and I can do anything I want with it. I don't care about this one or that one or anybody. I only care about Sam Schultz."[262] This conversation took place late in 1950,[263] the year Schultz purchased $2,232.60 worth of Nix-Size. in 1951 Schultz purchased $240.00 worth of Nix-Size.

On December 2, 1950[264] plaintiffs' Dovberg was making a delivery to the Camden Wallpaper store, allegedly owned by Samuel Schultz & Co. and he observed[265] some empty gallon cans which had contained Nix-Size. Near them were small

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257. Tr. p. 501.
258. Tr. p. 491.
259. Tr. p. 492.
260. Tr. p. 489.
261. Tr. p. 501.
262. Tr. p. 501.
263. Tr. p. 501.
264. Tr. p. 524.
265. Tr. p. 525.

cans with a label on them reading "Magic Liquid Size."[266] He picked up one of these small cans and observed directions on it "exactly what we gave on our Nix-Size package."[267] The manager of the store told him, "That's great stuff, that Nix-Size; that's a great product. We put Nix-Size in these cans and we put our label on the cans, but it's Nix-Size." And I asked him, "Why do you do this when they have small packages, pints smaller sizes," and he said, "Well, the boss likes to sell products under his own label. For years we have sold products under the name of Liquid Size; that's the trade name of Samuel Schultz & Co. and customers believe that whatever products we sell under the Magic label is our exclusive products."[268]

On June 26, 1951,[269] plaintiffs made a delivery to Samuel Schultz store on Front Street and Dovberg observed empty gallon cans of Nix-Size, as he had in the Camden store. He told Iz Kaplan, Sam Schultz' son-in-law and partner,[270] that Schultz & Co. was taking Nix-Size from "our gallons and they were putting it in their package under their exclusive label." Kaplan said that Dovberg would have to discuss this with Schultz personally,[271] but Dovberg did not.[272] He did note that the Magic Liquid Size was being sold for 50¢ and Nix-Size for 65¢.[273]

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266. Tr. p. 525.
267. Tr. p. 525.
268. Tr. pp. 525-526.
269. Tr. p. 530.
270. Tr. p. 531.
271. Tr. p. 531.
272. Tr. p. 532.
273. Tr. p. 532.

On November 19, 1951 Dovberg had a conversation with Schultz[274] in which the latter told him "that Mr. Flanagan had visited his store and that he was gunning [sic] mad because Sam Schultz was buying our wet paste, and Sam Schultz said: 'Dovberg, if you fellows continue to sell wet paste, this fellow could put you out of business. He is just the fellow who can do it.'"[275] [Wet paste products had been purchased by Schultz from August 25, 1950 through October 28, 1950.][276]

In December 1951 Dovberg observed that the North Front Street store of Samuel Schultz had a new display in the window.[277] Schultz had always prominently displayed Nix-Size and now Nix-Size was relegated to a lesser position with Magic Liquid Size and Liqui-Size also being displayed in the window.[278]

On March 13, 1952 Dovberg had a conversation with Sam Schultz[279] of which he made a memorandum the following day.[280] Schultz called him on the telephone, a call received at plaintiffs' factory.[281] Schultz told him that Flanagan had just left a sample there like Nix-Size, "exactly the same as your

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274. Tr. pp. 482, 487.
275. Tr. p. 475.
276. Tr. p. 475.
277. Tr. p. 532.
278. Tr. p. 540.
279. Tr. p. 548.
280. Tr. p. 544.
281. Tr. p. 548.

Nix-Size."[282] Schultz said he had a contract on his desk from Pennsylvania Paste and that when he signed it he would stop buying Nix-Size. He said he had tried "Pennsylvania's Nix-Size, that's how he referred to it," and found it to be exactly the same as plaintiffs' Nix-Size. "Mr. Flanagan, said Schultz, is going to sell it to me for much less than what I can get it from you." Dovberg told Schultz that he had patents pending, that his product had been licensed to no one, that he didn't believe Mr. Flanagan could sell an imitation at a lesser price[283] "unless he was enforcing the threat that he had made to me that he would produce the same products, sell it for less or below the cost that I could afford to sell ours, in an effort to put us out of business; and I told Sam Schultz that if he sold Mr. Flanagan's manufactured product under his exclusive label and if they did anything in joining in an effort, combined, to hurt our business that I would have to hold Mr. Schultz as responsible as I would the Pennsylvania Paste Company if they damaged our business. Schultz laughed and said, 'It was nice doing business with you, kid.'"

On March 13, 1952, Dovberg wrote a letter[284] to Samuel Schultz, to which he received no reply.[285] The first three paragraphs of the letter read:

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282. Tr. p. 549.
283. Tr. p. 550.
284. PX 106.
285. Tr. p. 551.

"In reply to you to our conversation to-day, I wish to advise that I profoundly regret your statement to me, that after using up your present stock of Nix-Size, you will not purchase our product for resale anymore. I am mostly shocked to believe from your statement, that you are preparing to negotiate a contract with a Company - who is going to package a product for you under your own label and Name, which is exactly like Nix-Size, our Wallsize eliminator, and does exactly what we claim Nix-Size does.

"It is difficult to believe that any Product other than Nix-Size can or will do what Nix-Size was created to do. But, by your own statement, you assured me, that as a Former Paperhanger with many years of experience, you have tested this product with remarkable results and in the proving have found it to be like Nix-Size in every respect.

"I honestly admit, that I am shocked to know that you, the S. Schultz Wallpaper & Paint Company, Our largest buyer and largest account in Philadelphia, who has until now - sold more Nix-Size and Jobbed same than any concern connected with us, will stop business associations with us - for the sake of accepting a similar Product as Nix-Size at a lesser Price."[286]

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286. Tr. pp. 552-553.

Dovberg's price for orders of five gross or more of Nix-Size on March 13, 1952 was $4.95 a dozen.[287] Pennsylvania Paste's prices for their competing products from April 4, 1952 to December 23, 1957 varied from between $2.40 to $2.85 a dozen. It is stipulated that Pennsylvania Paste packaged Magic Coat Liquid Size for Samuel Schultz & Co., a bottle of which[288] is a representative sample.[289]

Late in 1952, sometime after September 22nd, Dovberg noted an advertisement[290] of Samuel Schultz & Co. for Magic Liquid Size. He went into Schultz' Front Street store[291] and observed a bottle of Nix-Size marked down to 35¢, though Dovberg had advertised it for sale at 65¢. Magic Coat Liquid Size was then selling for 50¢.[292] Dovberg spoke to Iz Kaplan and complained about the fact[293] "that dealers were complaining that Sam Schultz was using Nix-Size as a decoy and selling an imitation of our product. He assured me that they would remove it (the lower price quotation), that he would discuss it with Sam Schultz and that they would remove that price quotation, and later they did."[294]

On June 29, 1953, Dovberg wrote a

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287. Tr. p. 574.
288. PX 108.
289. Tr. p. 592.
290. PX 99.
291. Tr. p. 570.
292. Tr. p. 570.
293. Tr. p. 571.
294. Tr. p. 571.

letter to Sam Schultz[295] soliciting business. After that date he continued mailing various solicitations to do business to Schultz & Co.[296]

Cellulose Base Paste

In the fall of 1951 plaintiffs' Dovberg went to Samuel Schultz' office.[297] Schultz told him of the difficulties in the wallpaper trade with flour based pastes staining the new solid color wallpapers.[298] Dovberg told Schultz of cellulose base paste and showed him a sample of it.[299] Dovberg showed him Calico Paste, told him he had invented it, and stressed the advantage of cellulose over flour as a base.[300] Schultz turned to his associate, Marvin Spiro, and said: "If this paste will do what Dovberg says it will do, there ought to be an important need for--there is an important need for such a product, and I believe we could sell quite a good bit of it."[301] Schultz and Spiro told Dovberg that they would bring Calico to a wallpaper convention the following week and attempt to interest United Wallpaper Co. in it.[302] Schultz told him, "If United Wallpaper accepted this product, if they liked it, they would probably get in touch with us and have us manufacture this product for their needs or their distribution."[303]

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295. Tr. p. 577.
296. Tr. p. 578.
297. Tr. p. 1463.
298. Tr. pp. 1460-1461.
299. Tr. p. 1462.
300. Tr. p. 1462.
301. Tr. p. 1462.
302. Tr. p. 1463.
303. Tr. p. 1464.

Dovberg never heard from Schultz again about the matter and never asked him about it;[304] he never heard from United Wallpaper Co.[305]

Schultz is a major distributor of United Wallpaper Co., the largest such concern in the world,[306] and the exclusive distributor in the Philadelphia area of Nancy Warren United Wallpaper Products. Dovberg has examined Nancy Warren non-staining paste and it has the same physical appearance as his Calico Paste and performed the same as Calico Paste.[307]

A schedule[308] of Dow's sales of Methocel to United Wallpaper indicates that Dow first sold Methocel CAM to United Wallpaper in January 1951 in the amount of 50 pounds.[309] The second sale was in December 1951 for 28 pounds;[310] the third sale in February 1952 for 10,812 pounds.

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304. Tr. p. 1466.
305. Tr. p. 1468.
306. Tr. p. 597.
307. Tr. p. 602.
308. PX 139.
309. Tr. pp. 1468, 1469.
310. Tr. p. 1469.

FOUR

ATLAS WALLPAPER CO.: Another defendant

I. ANALYSIS

A. THE CHARGES

Atlas is charged with (1) "discontinuing and refusing to resume their purchases of wall size eliminator,"[311] (2) "knowledge of Pennsylvania Paste's intent to drive plaintiffs out of business,"[312] and (3) "selling a wall size eliminator purchased from Pennsylvania Paste 'as being, or being the same thing as,' Nix-Size."[313]

1. Evidence has been introduced to show Atlas' cessation of purchases of Nix-Size from plaintiffs.[314]

2. Evidence has been introduced indicating that plaintiffs informed Atlas of Pennsylvania Paste's alleged intent.[315]

3. Apparently plaintiffs no longer charge that Atlas sold anything purchased from Pennsylvania Paste "as being, or being the same thing as" Nix-Size, as they concede that Pennsylvania Paste was not, in fact, the manufacturer of Atlas Liquid Size.[316] Nor has any evidence

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311. Statement of Contentions, p. 8.
312. Statement of Contentions, p. 8.
313. Statement of Contentions, p. 9
314. Tr. p. 648.
315. Tr. pp. 664, 676, 677.
316. Tr. p. 3472.

been introduced that Atlas' Liquid Size was sold as Nix-Size. Indeed, the only direct testimony on point is to the contrary.[317] The only evidence adduced for plaintiffs on this point is the testimony of William Dovberg, brother of plaintiffs Maurice Dovberg, that Manny Katz of Atlas told him that Atlas Liquid Size was Nix-Size.[318] This statement allegedly made by Katz followed a sale from Katz to a customer in which Katz, according to William Dovberg, had compared Atlas Liquid Size to Nix-Size, and came as a result of William Dovberg's complaint that Nix-Size had not been recommended to the customer.[319]

B. COMMENTS

The case against Atlas is weak. Assuming Atlas' knowledge of Pennsylvania Paste's alleged intent, and assuming Atlas' discontinuance of business with the plaintiffs, as charged by plaintiffs, no direct case is made against Atlas, unless the jury is also convinced that Atlas claimed or sold Atlas Liquid Size as being the same thing as Nix-Size. Without the third charged overt act, the first two can hardly be sufficient grounds to prove conspiracy. Even with the third, however, plaintiffs are faced with serious problems. For, as charges against Atlas drift farther away from acts of Pennsylvania Paste, evidence against Atlas becomes weaker.

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317. Testimony of R. Applebaum, Tr. pp. 4051, 4118.
318. Tr. pp. 4356, 4402, 4403.
319. Tr. pp. 4355-4357.

At best, the charge now is that defendants sold a wall size eliminator made for them by a company not involved in this suit, with defendant's knowledge that such sale would harm plaintiffs, and defendant's knowledge that Pennsylvania Paste was attempting to put plaintiffs out of business. There is, in addition, minimal evidence that Atlas intended to contribute in whatever way it could to help put plaintiffs out of business.[319a] Whether this is sufficient to constitute a prima facie case against Atlas is dubious.

II. SUMMA OF DIRECT TESTIMONY RE DEFENDANT ATLAS WALLPAPER CO.

Atlas Wallpaper Co. was mainly in the "jobber and distributing business" of wallpaper and related products.[319b] While Atlas was a distributor of wallpaper during the period in question in the suit, it sold wall size eliminator and wallpaper paste products primarily on a retail basis.[320] Manny Katz was the manager of Atlas.

A. WET PASTE PRODUCTS

Plaintiffs never sold wet paste to Atlas. Dovberg attempted to, but Katz

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319a. Tr. p. 646; infra, p. 62.
319b. Tr. p. 617.
320. Tr. p. 619.

told him he had a special arrangement with Pennsylvania Paste "that he wouldn't or couldn't sell anybody else's wet paste and this was the reason why he couldn't buy wet paste from me."[321] This conversation took place during the early period of business between Atlas and plaintiffs.

B. NIX-SIZE

Plaintiffs sold Nix-Size to Atlas from February 11, 1950 through May 20, 1953.[322] The first order came about after Katz called and ordered one gross of pint size Nix-Size. When plaintiffs' Dovberg delivered it, Katz said, "You know, you have a wonderful product -- I heard a lot about it -- but I really shouldn't buy from you. In fact, I don't know why I am buying it."[323] Katz explained that the reason for his hesitancy in doing business was that Dovberg's brother, Bill, owed Katz a sum of money. Upon Maurice Dovberg's promise to pay his brother's debt, Katz was willing to continue in a business relationship.[324]

Purchases increased through 1950 and Katz "told me on a couple of occasions that this was a great product, that it was a very fast selling item, and that everybody asked for it, everybody liked it, and he felt he could do a very good job distributing it."[325]

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321. Tr. p. 636.
322. Tr. pp. 621, 622.
323. Tr. p. 625.
324. Tr. p. 626.
325. Tr. p. 627.

On August 30, 1950 plaintiffs' Dovberg made a delivery to Katz who told him "he would like me to package under his label, his exclusive label. I explained to Manny Katz that I had a patent pending and that I couldn't consider it at that time, but, at any rate we left that matter just as it was."[326]

On October 30, 1951 Katz asked Dovberg to stop selling Nix-Size to the Charles Wallpaper Co., a competitor located on the next block to Atlas. Dovberg told Katz that he sold to anyone who ordered from him. Katz warned "that he has connections with big distributors, big manufacturers, that he could hurt me, that he would even be willing, if I didn't stop selling to his competitor, to procure an imitation of our product, of Nix-Size, and sell it as such in an effort to hurt me, and he would contribute in whatever way he could to help put us out of business."[327]

On December 21, 1951 (this date is uncertain) plaintiffs' Dovberg noted "Manny is very enthused about Nix-Size. He says the product is great and was an excellent repeater."[328]

On November 21, 1952 plaintiffs' Dovberg made a delivery to Atlas; at that time Katz "told me that he was selling an imitation of our Nix-Size, that it even smelled like our Nix-Size, and I recall cautioning him that we had patents pending, that we hand't licensed anyone to

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326. Tr. pp. 628, 628a
327. Tr. p. 648.
328. Tr. p. 635.

sell any imitation of our Nix-Size..."[329] Katz told Dovberg that he, Katz, would eventually use up his current supply of Nix-Size. "He also dictated to me how much he would pay for Nix-Size and demanded that I sell it to him at his price."[330]

On March 10, 1953, Katz told Dovberg that he did not wish to buy Nix-Size any more because the Charles Wallpaper Co. was selling it. He wanted to sell No-Size, Nix-Size under a different label, instead.[331] In the midst of the conversation, Katz was called to the back of the store and Mr. Saraco of Atlas told Dovberg that Katz was considering putting a product just like Nix-Size on the market soon under his own label.[332]

Katz made his final purchase from plaintiffs on May 20, 1953.[333]

At no time throughout the period of sales did Katz ever complain about the physical properties of Nix-Size until, close to the end of the business relationship, he complained that Nix-Size showed excessive precipitation. Dovberg notes, however, that the directions on Nix-Size say that it should be shaken well and that all similar products also precipitate if not shaken.[334]

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329. Tr. pp. 650, 651.
330. Tr. p. 652.
331. Tr. p. 657.
332. Tr. p. 658.
333. Tr. p. 660.
334. Tr. p. 637.

In the spring of 1954 Dovberg was driving home from a baseball game when he noted someone continually bumping his car from behind.[335] The next morning he received a call from Katz in which the latter told him that he was bumping me," that he called "to tell you that you are a big schmuck ... I told you ... to stop selling ... Charles Wallpaper Co. I asked you not to sell him Nix-Size. You wouldn't listen and now I am telling you that I am having manufactured for me a wall size eliminator just like your Nix-Size under my exclusive label, and I am going to tell the people who buy this product that it is your Nix-Size." Katz stated that he would even attempt to make the product smell the same.[336] Dovberg told Katz that "Mr. Flanagan ... told me or threatened me that he was going to produce an exact duplication of our Nix-Size and sell it below cost, if necessary, for the express purpose, of putting us, the Paste Company of America, out of business, and if you market an imitation of our product under your exclusive label, and tell people that this is Nix-Size, and if you go along with Mr. Flanagan in his effort to put us out of business, if you hurt us, I am going to hold you as responsible as I will Mr. Flanagan of the Pennsylvania Paste Company..."[337]

Soon after the conversation Dovberg obtained a jar of Atlas' Liquid Size,[338] Atlas' competitive product

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335. Tr. pp. 661, 662.
336. Tr. p. 663.
337. Tr. p. 664.
338. Tr. p. 667.

to Nix-Size. Directions on it are similar to those on Nix-Size.[339]

On December 18, 1956 Dovberg wrote a non-registered letter to Katz to which he never received any reply.[340] The first three paragraphs of it read:

> "I learned during the height of the season this year that you have sold quite a lot of an imitation of Nix-Size to people who have requested our Nix-Size, by telling all that your Atlas Wall Size Eliminator was Nix-Size packaged for you under your own label.
>
> "Such reports coming from you would not surprise me in the least, since already did tell me that Mr. Flanagan is going to put me out of business and that you would help him do it, because I refused to sell your competitor Charles Wallpaper Company, any product under some other label to give you control of Nix-Size on South Street and your stores. Further, since you demanded that I stop selling him any goods altogether.
>
> "I also learned that your co-workers including your younger brother were also telling customers that your imitation of Nix-Size was the original Nix-Size product under your label and manufactured for you by the Paste Company of America. Such lies and misrepresentations is causing you

339. Tr. p. 668.
340. Tr. p. 670.

to cooperate with our competitor who has stated that he will put into effect through the cooperation of local wallpaper stores, actions which will bring about the collapse of our business."[341]

C. CROSS AND RE-DIRECT EXAMINATION

Dovberg only learned after his depositions were taken in 1959 that Jacone and not Pennsylvania Paste was the manufacturer of Atlas Liquid Size.[342] Some time between 1950-53 Katz told Dovberg that he could get Liqui-Size from Flanagan for a lesser price packaged under Atlas' label. This is the reason why he believed Flanagan made Atlas' Wall Size Eliminator for it.[343]

Dovberg does not know how much wet paste Atlas ever bought[344] nor does he know how much Cellu-Stick was purchased by Atlas.[345] Aside from discovery procedures, Dovberg did not know how much Liqui-Size Atlas bought from Pennsylvania Paste.[346] Atlas' total purchase of Liqui-Size from Pennsylvania Paste was $32.42;[347] Atlas' total purchases from plaintiffs was $1489.90.[348]

Dovberg believes that Katz' most important motive in wanting No-Size was

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341. Tr. pp. 676, 677.
342. Tr. p. 3472.
343. Tr. p. 681
344. Tr. p. 3432.
345. Tr. p. 3433.
346. Tr. p. 3433.
347. Tr. p. 3655.
348. Tr. p. 3658.

"he seemed to feel like he wanted a product under his own label."[349] Katz also wanted to sell something that Charles Wallpaper Co. did not have.[350]

Dovberg's alleged 1954 conversation with Katz follows Atlas' commencing to purchase Atlas Liquid Size from Jacone by a couple of months.[351] Dovberg sent a private investigator to one of Atlas' stores in March 1958. The investigator asked for Nix-Size, was told that Atlas did not have it, but that it had a similar product which was far superior.[352]

At no time throughout the period, did any patent counsel ever advise Dovberg that anyone was infringing on his patent.[353]

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349. Tr. p. 3436.
350. Tr. p. 3437.
351. Tr. p. 3472.
352. Tr. p. 3467.
353. Tr. p. 3686.

CONCLUSIONS SUR MOTIONS FOR DIRECTED VERDICT

As the case proceeded, and up to and since plaintiffs rested, the entire daily record in the case at bar has been studied. The whole area of plaintiffs' case is pretty thin, but not enough for me to hear the ice cracking. This is no time to weigh and evaluate disputed evidence, for this is not a judge's function in determining a motion for a directed verdict. Neither is it a time to make nice legal distinctions and refined analyses of proof as to what may or may not constitute sufficient proof or lack of it to sustain violation of the antitrust statutes. At the outset, it was noted, to direct a verdict the judge must be certain as a matter of law plaintiffs' proof is so totally lacking there could be no rational basis for permitting the jury to look at the evidence. In truth, this means there is no proof, or, at least, such a meagre proof that the prima facie case has not been met. On the basis of the voluminous record before me, as I have referred to parts of it at length, supra, I am not prepared, at this time, to rule, as a matter of law, that it is clear defendants should have their verdicts:

1. Dow Chemical Company

Almost all evidence presented by plaintiffs as to Dow's alleged motive

has been negated. Unlike the wholesaler defendant, Pennsylvania Paste, Dow was not a competitor of plaintiffs. Unlike the retailer defendants, Dow had no direct contact with the wholesaler, Pennsylvania Paste, no conceivable reason to win its favor, and no apparent purpose in helping to force plaintiffs out of business.

All evidence presented by plaintiffs as to prices paid by competitors to Dow is negated by plaintiffs' courtroom admission that Methocel CAM and Methocel MCNF are different products, with different degrees of viscosity. Plaintiffs' apparent allegation that Dow failed to encourage them sufficiently to purchase Methocel MCNF is a likewise legally thin base from which any conspiratorial inference may be drawn by the jury.

Plaintiffs' evidence as to credit terms is legally slight to raise any jury question. Plaintiffs were in debt to Dow when Dow cut off credit, after allowing plaintiffs 30-day credit for approximately one year. Plaintiffs offer no evidence of substance that Dow treated any other customer of comparative size and financial reliability differently than it treated plaintiffs.

At best, evidence has been adduced to support the following inferences: Dow knew of Pennsylvania Paste's alleged intent; Dow knew of the importance of methylcellulose to plaintiffs' business; Dow sold the plaintiffs in small amounts;

Dow took the plaintiffs off 30-days credit. Taken together, this places Dow in a position where the jury may draw inferences[354] that Dow is a party who knowingly acted in pursuance of a conspiracy. But whether Dow stands without contact with Pennsylvania Paste, without reason to aid Pennsylvania Paste, this is for the jury to find.

Dow's motion is denied.

2. Pennsylvania Paste

Pennsylvania Paste's motion is denied. A sufficient quantum of evidence has been adduced by plaintiffs to allow the case against this defendant to go to the jury. Evidence has been adduced, for example, as to alleged statements of Mr. Flanagan, of Pennsylvania Paste's intent to force plaintiffs out of business; of Pennsylvania Paste placing on the market Liqui-Size with the intent to force plaintiffs out of business; of Pennsylvania Paste's costs being the same or higher than those of plaintiffs; of Pennsylvania Paste selling its product for prices below cost; of Pennsylvania Paste taking butter tubs belonging to plaintiffs. In short, sufficient factual

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354. The Court makes no finding or decision at this point, whether all the evidence would support the finding of any inference-fact in the trial of the case at bar.

questions have been presented by plaintiffs to allow the jury to rule on the issues.

3. Samuel Schultz & Co.

Schultz's motion is denied. Evidence has been adduced that Schultz knew of Pennsylvania Paste's illegal aim; that Schultz acted in furtherance of it by selling the wall size eliminator purchased from Pennsylvania Paste as being, or being the same thing as, Nix-Size. Of itself, such evidence is legally sufficient to allow the jury to rule on the allegations.

4. Atlas Wallpaper & Paint Co.

Atlas' motion is denied. Though the case against Atlas is sufficiently frail to stir grave doubts as to its legal sufficiency, as already suggested, supra, plaintiffs have presented evidence from which the jury may infer that Atlas knew of Pennsylvania Paste's alleged illegal intent; that Atlas intended to contribute to it; that the form Atlas took to contribute to it was to cease purchasing from plaintiffs. On the basis of such evidence and the heavy weight of legal presumption against granting the motion, the motion is denied.

5. Empire Wallpaper & Paint Co.

At the commencement of the trial

of the cause, plaintiffs' counsel stated that no proof would be adduced as against Samuel Milkis, t/a Empire Wallpaper & Paint Co.[355] No evidence of any kind has been offered against this named defendant. Accordingly, the motion for directed verdict as to Samuel Milkis, t/a Empire Wallpaper & Paint Co. will be granted.

It may be added that all defendants argue that no evidence has been introduced as to acts which occurred within the four-year period prior to the commencement of this suit on September 25, 1954. In conformity with the opinion denying summary judgment for defendants, 195 F.Supp. 337, much evidence directed to the alleged conspiracy and the attempts of Pennsylvania Paste to dominate and preserve its position in the particular line of commerce was allowed to be offered covering the period before the year 1954--the time when the statute of limitations began to operate; but evidence was introduced of events occurring after that time which were either in the nature of overt acts or presented fact situations from which the jury might arrive at inferences that the alleged conspiracy and the attempt to preserve the market were still operative. For example, evidence was admitted of orders placed by buyers after the 1954 date and which plaintiffs were forced to refuse because of the alleged results of the charged conspiracy. Other instances

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355. Tr. p. 607.

of circumstances concerning the active state of the alleged conspiracy likewise occurred post 1954 which may be brought to the jury's attention at summation. At this time, therefore, the argument of defendants is not persuasive that the motions should be granted on the basis of the statute of limitations as a matter of law.

Professor Moore has stated[356] when the Court has any doubts as to whether to grant a motion for a directed verdict, the better practice is not to direct, but to reserve decision and let the jury bring in a verdict. Judge Frank was of the same view and wrote[357] that as to trial judges it may be suggested -

> ..."that, generally speaking... although there may be exceptions-- it is desirable not to direct a verdict at the close of the evidence, but to reserve decisions on any matter therefor and allow the jury to bring in a verdict ..."

Under this procedure the nisi prius judge is in a position to consider a post verdict motion under FR 50(b) and he can set the verdict aside, if he thinks it improper, and grant judgment notwithstanding the verdict, for a motion for such

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356. 5 Moore, op. cit. p. 2320.
357. Fratta v. Grace Line, Inc., 2 cir., 139 F.2d. 743, 744.

judgment in accordance with a movant's motion for a directed verdict is, of course, to be tested by the same legal standards as well as to see if the proofs are in equipose and where the preponderance of the evidence rests, and whether plaintiffs' burden of credible proof has been established. The ratio behind the cases which have decided that directed verdicts should only be utilized in the exceptional case is that crucial issues of fact and the inferences to be drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed.[358] This is so, even though the judge may not believe the evidence of may think that the weight of the credible evidence is on the other side, for under the constitutional guaranty of jury trial, it is for the jury first to weigh the evidence.[359] At another time, Judge Frank said: "It is unfortunate that (especially after a long trial) the judge took the case

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358. Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 cir., 269 F.2d 950; Sattler v. Great Atlantic & Pacific Tea Co., W.D. La., 18 FRD 271.

359. Roedegir v. Phillips, 4 cir., 85 F.2d 995.

from the jury."[360]

All motions for directed verdicts, except of Empire Wallpaper & Paint Co., are denied.

Dated: February 21, 1962.

At Philadelphia.

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360. Linderman v. Textron, Inc., 2 cir., 229 F.2d 273. See, too, Saunders v. Pool Shipping Co., 8 cir., 235 F.2d 729; Craighead v. Missouri Pac. Transp. Co., 8 cir., 195 F.2d 652.

(Caption omitted)

(Appearances omitted)

LEAHY, Senior District Judge.

MEMBERS OF THE JURY:

This has been a long case. You have sat patiently, listened carefully, and observed both witness and counsel that have appeared before you. It is now your duty to judge, to decide whether the defendants -- any or all -- have violated the Anti-Trust Acts as charged.

Before you decide for either the plaintiff or the defendants, it is my duty to charge you on the law in the case, to explain to you what the Anti-Trust Acts mean as discussed in this case and to instruct you on all legal as distinguished from factual matters that may arise in your consideration. You and I have different tasks here. I instruct you on the law in the case, the legal application of such facts as you shall determine. You decide the facts. All facts are to be determined by you alone and weighed by you alone in making your decision. Whatever counsel may say, whatever witnesses may say, whatever you may -- mistakenly or not -- think my opinion may be in the case, only you can decide what happened here; only you can determine who wins here.

If, in these instructions, any rule,

direction, or idea is stated by me in such a way as to make you think I have deliberately put emphasis on it and to infer to you how I think the case should be decided, no such emphasis is intended by me, and none should be inferred by you. For that reason, you may not single out any particular sentence or any individual point or instruction and ignore the others, but should, instead, take the instructions as whole, taking each instruction in the light of all the others.

Many witnesses have testified before you. In determining what weight and credibility to give to each one, you should consider the relation of each witness to the case, and to the parties in the case, and their interest, if any, in the case and its result. You may and should consider their temperament, feeling, or possible bias; their demeanor while testifying; their apparent intelligence or means of information concerning the things of which they testify; their situation and ability to know the matters to which they have testified; and the reasonableness or unreasonableness of their testimony. In other words, you should give such weight and credit to the testimony of each witness as under all the facts and circumstances in evidence you believe it fairly entitled to receive.[1] In this connection, if you believe that any witness has testified falsely to any material fact, you may disregard any other

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1. Aetna Life Insurance Co. v. Ward, 140 U.S. 76, 88; Quock Ting v. United States, 140 U.S. 417, 420-421.

portion or the entire testimony of that witness.

This trial has lasted a long time. There has been a large volume of evidence. The length of time it has taken to present evidence for one side or the other, or the quantity of evidence presented, does not determine the merits of the point of view presented by one side or the other. The important consideration is the quality of the evidence presented and its persuasive effect on you. Much evidence has been admitted for your consideration, sometimes over objection of counsel. I charge you now the fact that a piece of evidence has been allowed to go in does not mean that it has any intrinsic merit. That, too, is for you alone to determine. My decision that certain documents may be considered by you means only that they are not so prejudicial as to require their exclusion from your consideration. In considering any piece of evidence submitted to you, you should take into account the circumstances under which the piece of evidence came into being. When was it prepared? Who wrote it? Why was it written? Was it written in the heat of passion? Do you trust the person who wrote it? Does it prove what counsel claims it does? All these questions, and more, may properly be considered by you in the course of your deliberation. You are to consider only the evidence in the case. But, in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you

are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.[2] In other words, you should give such weight and credit to each piece of evidence submitted to you, as under all the facts and circumstances in the case, you believe it is fairly entitled to receive.

This action has been brought under Acts of Congress known as Anti-Trust Laws, which read in part as follows:

> "Every contract, combination ... or conspiracy in restraint of trade or commerce among the several states is declared to be illegal."[3]

The phrase "every combination or conspiracy" which is used in the Act is a very broad one, but the courts in construing it have narrowed it somewhat by construing the Act to apply only to unreasonable restraints of trade, so that, in effect, this section of the Act reads as follows:

> "Every contract, combination or conspiracy which is unreasonably in restraint of trade or commerce among the several states is declared to be illegal."[4]

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2. Olson v. United States, 1934, 292 U.S. 246, 247, 54 S.Ct. 704, 78 L.Ed. 1236.
3. Sherman Act, 15 USCA §1.
4. Standard Oil of New Jersey v. United States, 221 U.S. 1.

This action also has been brought under another section of the same Act of Congress, a part of which provides:

> "Every person ... [and this includes corporations][5] who shall monopolize, or attempt to monopolize ... any part of the trade or commerce among the several states ... shall be deemed guilty of a misdemeanor ..."[6]

A different section of this Act, sometimes called the Robinson-Patman Act, provides in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality..."[6a]

However, no evidence has been presented in this case to indicate that any violation has occurred of this particular section by any party here involved.

Another section of this Act provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws

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5. Sherman Act, 15 USCA §§7, 12.
6. Ibid. §2.
6a. 15 USCA §13.

may sue therefor in any District Court of the United States ..."[7]

Under this latter section, this action has been brought. The mere fact that a suit has been started does not mean that the plaintiffs are entitled to recover damages. The burden is upon the plaintiffs to prove their case, and all the essential elements of the case, by the fair weight, by the preponderance of the credible evidence in the case, and in accordance with the law as I am giving it to you.

To "establish by a preponderance of the credible evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the credible evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.[8]

The term "preponderance of evidence" in other words, means the greater weight of credible evidence. The number of witnesses called by one party or the other is not determinative of the weight of the evidence. In your determination of the weight of the evidence, you should give consideration to the persuasive quality of the evidence and its

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7. Clayton Act, 15 USCA §15.
8. Burch v. Reading Co., 3 Cir., 240 F.2d 574, 578-579.

probative value. There is a preponderance of evidence where its persuasive quality is such that it best accords with reason and probability.

The burden of proof in this case rests upon the plaintiffs, the Dovbergs, to prove their claim against the defendants by a preponderance of the evidence, but this rule does not require demonstration, or such degree of proof as produces absolute certainty, since in human affairs absolute certainty is seldom possible.[9]

The burden is upon the plaintiffs to prove by a fair preponderance of evidence:

First: that these defendants or any of them are guilty of any violation of the anti-trust laws as charged; and second: that any such violation was the proximate cause of the business injury through which compensation is here sought.

Mere proof of a violation of an anti-trust law will not entitle the plaintiffs to recover in the absence of further proof that the violation was the proximate cause of injury to the plaintiffs' business.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if, after consideration of all the evidence in the case, you

9. Ibid.

believe that what is sought to be proved on that issue is more likely true than not true.[10]

The mere fact that the plaintiffs have seen fit to join a number of parties as defendants does not mean that all or any of them are liable to the plaintiffs, unless their liability is proved in accordance with the instructions I am giving you. Plaintiffs' claim must be judged separately as to each defendant, and the position of each defendant must be judged on its own merits. Each defendant is entitled to individual consideration of the evidence as applied to it to determine whether or not that particular defendant is liable.[11]

Throughout your consideration of this case, you should keep the first two sections of the Anti-Trust Acts that I have read to you clear and separate in your minds. The first one that I read to you went to the question of conspiracy in restraint of trade. The second one went to the attempt to monopolize any part of the trade or commerce among the states. Under the first one, the plaintiffs charge all the defendants with being a part of a conspiracy. Under the second, they accuse Pennsylvania Paste Company alone of an attempt to monopolize the wet paste manufacturing business in the Philadelphia area.

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10. Ibid.
11. 28 F.R.D. 451.

Let us consider the first one:

The Dovbergs, plaintiffs in this case, contend that these four defendants, Pennsylvania Paste Company, their competitor; Dow Chemical Company, their supplier; and Samuel Schultz and Company and Atlas Wallpaper & Paint Company, conspired together to destroy plaintiffs' business and thereby preserve Pennsylvania Paste Company's dominant position in the wet paste manufacturing business in the Philadelphia area and Dow Chemical's control of the use of the chemicals known as methyl cellulose and sodium orthophenolphenate.

What is a conspiracy? It is a combination of two or more persons or corporations by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. It is thus a form of partnership in criminal purposes, in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.[12] A conspiracy under the Anti-Trust Acts is an understanding with respect to engaging in a course of conduct the result of which is to restrain trade.[13] One defendant alone cannot be guilty of being

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12. 28 F.R.D. 459.
13. Grim, J., Charge to Jury (Tr. 4106), Sablonsky v. Paramount Film Distributing Co., D.C.E.D.Pa., 137 F. Supp. 929.

a conspirator. A conspiracy must contain two or more persons or corporations.[14]

One need not trade with anyone with whom he does not wish to trade. One need not trade with anyone or everyone who wishes to do business with him.[15] One need not compete in a half-hearted or constrained manner. But there are limitations on one's business activity. One may not make a decision not to do business with another as a result of a conspiracy to drive the other party out of business. One may not compete against him in various ways (to be detailed throughout this charge) as a result of or after having joined a conspiracy the purpose of which is to drive the competitor out of business.[16]

The crucial question in this case is this: did two or more of the

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14. Union Pacific Coal Co. v. United States, 173 F. 737; Lowlor v. Loewe, 209 F. 721, affd. 235 U.S. 522; United States v. Reading Co., 183 F. 427, modified on other grounds, 226 U.S. 324; United States v. American Naval Stores Co., 172 F. 455. Cf. Paramount Pictures v. United Motion Picture Theatre Owners, 3 Cir., 93 F.2d 714.

15. 15 USCA §13.

16. See, Delaware Valley Marine Supply Co. v. American Tobacco Co., 3 Cir. ____ F.2d ____ (December 8, 1961 Slip Opinion, p. 5).

defendants combine, conspire or agree to do various acts, such as not selling to the plaintiff on credit, not buying from the plaintiffs, and not competing fairly with the plaintiffs for the purpose of driving the plaintiffs out of business? In other words, did Dow Chemical refuse to extend credit to the Dovbergs because of a business decision on Dow's part, be it a good or bad one, that the Dovbergs were not good credit risks; or did Dow make the decision in order to assist Pennsylvania Paste in driving the plaintiffs out of business? Did the defendant Samuel Schultz and Company and the defendant Atlas Wallpaper & Paint Company cease purchasing and selling the plaintiffs' products as a result of a business decision on their part or to assist Pennsylvania Paste Company in driving plaintiffs out of business? Did the defendant Pennsylvania Paste Company act towards the plaintiffs as it did (their actions, of course, to be determined by you) as a result of independent business judgment on its part or as a result of an agreement, combination or conspiracy,[17] or while inviting others to assist it in acting in destroying the plaintiffs' business?

You may wonder how you can possibly determine such intent. What can you look to to assist you in determining why certain acts -- if done -- were done? Express agreement is not required between conspirators. It is enough that uniformity of action is contemplated by the

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17. Ibid, p. 10.

defendants and that the defendants conformed to the arrangement. If any party understands that another wants him to pursue a particular business policy, the effect of which in view of the policies adopted by the other will be unreasonable restraint of trade, and if he adopts that policy, knowing it will result in an unreasonable restraint of trade, and it does result in such restraint of trade, then he and his associate or associates are guilty of conspiracy in violation of the Anti-Trust Laws.[18]

Neither formal agreement nor direct communication is required among conspirators. Conspiracy may be found in a course of dealing or other circumstances, as well as in an exchange of words.[19] It can be proved by circumstantial evidence, evidence which without going directly to prove the existence of an asserted fact gives rise to a logical inference that such asserted fact does in fact exist. But before a conspiracy can be said to have been proved by such circumstantial or inferential evidence alone, it is necessary not only that the

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18. United States v. Masonite Corp., 316 U.S. 265, 275; William Goldman Theaters, Inc. v. Loew's, Inc., 3 Cir., 150 F.2d 738, 743-744.

19. American Tobacco Co. v. United States, 328 U.S. 781, 809-810.

circumstances proven by the evidence shall reasonably give rise to an inference of conspiracy, but also that no other equally reasonable inference can be drawn from the same circumstances. If two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the evidence of a conspiracy and the other inconsistent, you should not infer the existence of conspiracy from such evidence alone.[20]

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.[21]

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that another has embarked on an unlawful course of action with which cooperation is invited, and that the defendant, or any other person who is claimed to have been a

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20. Steel, J., Charge to Jury (Tr. 3763) Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, affd. 3 Cir., ___ F.2d ____ (Dec. 8, 1961). Wyeanski, J., Charge to Jury, Cape Cod Food Products v. National Cranberry Assn., D.C.Mass. 119 F.Supp. 900, 903.

21. 28 F.R.D. 460.

conspirator, knowingly and willfully participated in the accomplishment of that plan with the intent to advance or further some object or purpose of the plan.[22]

To participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to do what the law forbids, or with specific intent to fail to do what the law requires to be done; that is to say, to participate with the motive or purpose to disregard the law. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and willful participant -- a conspirator.[23]

One who knowingly and willfully joins another or others in carrying out an improper course of action is charged with the same responsibility as if he instigated or originated the campaign himself.[24] One may not become a member of a conspiracy unknowingly or accidentally. He can become a member only consciously and deliberately, and with knowledge either that the conspiracy which he is joining already exists or that he is taking part in its formation.

In determining whether or not a

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22. Ibid. p. 460.
23. Ibid. p. 460.
24. Ibid. p. 460.

defendant was a member of a conspiracy, you are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct what he himself said or did.[25] But if you once find that a defendant has become a member of a conspiracy, then he is chargeable with responsibility for the actions of all parties to the conspiracy, whether committed before he became or during the time he was a member of the conspiracy.

There is no direct evidence in this case that any defendant agreed with any other defendant to attempt to put the plaintiffs out of business. No one has testified to any meeting between any two or more of the defendants at which any definite agreement to that effect was reached. Your duty will be, therefore, to examine all the circumstantial or inferential evidence in determining your answer to the basic question, whether the action of any of the defendants in this case stemmed from independent decisions or from any implied or tacit agreement with other defendants.

You should consider all the reasons parties in this suit have given for their acts. If they seem to you to be honest ones, advanced in good faith, you should take that into account in determining what happened. If they seem

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25. Ibid. p. 460.

dishonest, hastily made, advanced in bad faith, you whould take that into account.

A conspiracy may be inferred by you if on the basis of all the evidence submitted to you, you conclude that the action of the retailer defendants and/or Dow Chemical Company in allegedly refusing to deal with the plaintiffs, or in dealing with plaintiffs in the allegedly discriminatory manner alleged by plaintiffs was not a matter of sheer coincidence.[26] Evidence tending to show that there was a legitimate business reason for the act of defendant retailers and Dow Chemical in allegedly refusing to deal with plaintiffs, or in dealing with the plaintiffs in the allegedly discriminatory manner alleged, is admissible to refute the conspiracy based on circumstantial evidence; but if the all-over evidence is sufficient to support an inference that the defendants entered into a conspiracy with Pennsylvania Paste Company, the fact that a defendant's individual refusal to deal, or apparently discriminatory dealing, may be explainable as a reasonable business decision will not of itself justify his conduct or deprive it of its illegal character.[27] Should you find, however, that independent business judgment on the part of the defendants was the reason for their conduct toward plaintiffs, it does not follow that there has been a conspiracy against plaintiffs; nor may you infer

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26. William Goldman Theaters v. Loew's Inc., 3 Cir., 150 F.2d 738, 743.
27. Steel, J., Charge to Jury (Tr.3771) supra, n. 20.

from such conduct the existence of a conspiracy, merely because such conduct resulted in some harm to plaintiffs.

In determining whether or not the retailer defendants and/or Dow Chemical conspired with Pennsylvania Paste Company in refusing to deal with the plaintiffs, you may consider such evidence as was introduced which might suggest that such a conspiracy would be of financial benefit or advantage to the retailer defendants and Dow. Lack of such a financial benefit or advantage would tend to negate or refute the existence of such a conspiracy, but would not conclusively do so.[28]

You should note, though, that even if you find a pattern on the part of Dow and the retailer defendants not to deal with the Dovbergs, or to deal with the Dovbergs in a discriminatory manner, this is not enough in itself to prove a conspiracy. Proof of conspiracy must be forthcoming in addition to a general pattern being shown of refusal to deal. You must be convinced that all the elements of conspiracy I have previously described to you are present.[29]

Incidentally, in passing I made reference initially to the Robinson-Patman Act with respect to price

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28. Ibid. at p. 3771.
29. Delaware Valley Marine Supply Co. v. American Tobacco Co., CA 13,369, 3 Cir., ____ F.2d _____ (Dec. 8, 1961, Slip Opinion p. 14).

discrimination to commodities of like grade and quality. In this case, Methocel is not a like product to what has been referred to here as CAM; and, therefore, that statute has no application to issues presented to you.

You may notice that I have spent the preceding minutes speaking only of the retailer defendants and Dow Chemical. The heart of the alleged conspiracy here is Pennsylvania Paste Company. Plaintiffs charge Pennsylvania Paste Company with being the hub or focal point through which the activities of one set of defendants are related to the other, and, therefore, to each other.[29a] The defendant Dow is not alleged to have had any conspiratorial relation with the retailer defendants. Nor are the retailer defendants alleged to have conspired among themselves. The alleged conspiracies are between Dow and Pennsylvania Paste on one hand, and Pennsylvania Paste and the retailer defendants on the other. You may not, therefore, find any conspiracy of which Pennsylvania Paste is not a part. By saying this, of course, I do not imply or infer that you need find any conspiracy at all.

I wish now to suggest to you some questions you may put to yourselves in deciding whether any conspiracy

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29a. Brief on behalf of Pennsylvania Paste Company, Sur Motion for Summary Judgment, p. 9.

existed between any of the defendants. I emphasize at the start that these are merely my suggestions to you, which you are not bound by, and which you might profitably use as tools to lead you to further questions in your attempt to determine what happened here.

As to Pennsylvania Paste Company --

You may wish to ask yourselves what telephone calls did occur between Mr. Dovberg and Mr. Flanigan, and what was said in them -- whether Pennsylvania Paste actually did collect butter tubs of the plaintiffs in which plaintiffs' wet paste had been delivered -- whether Mr. Flanigan did in fact threaten retailers (some of whom you have heard testify here) that he would deprive them of their source of wet paste if they continued to do business with the plaintiffs -- whether Pennsylvania Paste did sell its Liqui-Size at a cost below which it could have made any profit -- whether Pennsylvania Paste sold Liqui-Size as a wall size eliminator whose form, composition and packaging were designed as an imitation of Nix-Size, or whether Liqui-Size was a legitimate competing product -- whether, in short, Pennsylvania Paste acted as a conspirator in an attempt to restrain trade by driving the Dovbergs out of business, or whether it merely acted as a competitor in a highly competitive field, did nothing illegal, and conspired against no one.

With respect to the retailer defendants, Samuel Schultz and Atlas Wallpaper, each of whom, I repeat, must be considered separately by you --

You may consider such questions as whether these retailers, either or both, discontinued purchases from plaintiffs knowing of Pennsylvania Paste's allegedly conspiratorial intentions, -- whether either or both sold Liqui-Size as being or being the same thing as Nix-Size -- whether, in toto, either or both conspired with Pennsylvania Paste in its alleged intent to put the Dovbergs out of business.

You should note that the mere termination of purchases of Nix-Size from the plaintiffs and the commencement of purchasing Liqui-Size under the name "Magic Coat" from Pennsylvania Paste Company by Samuel Schultz & Co. is not in itself evidence of a conspiracy unless plaintiffs also show that defendant Schultz made this change as a part of the alleged conspiracy to put plaintiffs out of business. Similarly, the action of defendant Atlas in terminating its purchases is not in itself sufficient evidence of conspiracy unless this defendant made the change as part of a conspiracy to drive plaintiffs out of business.

No direct evidence has been presented to you that defendant Schultz was at any time informed by any of the other defendants, or discussed with any

other defendant, any action against the plaintiffs designed to cause them loss or put them out of business. Your decision here, as elsewhere, must be whether the totality of the facts presented to you indicate that Schultz and/or Atlas knowingly participated, or did not knowingly participate, in the alleged conspiracy.

As to Dow Chemical Company --

You may consider whether Dow knew of the alleged intentions of Pennsylvania Paste Company, whether Dow wished the plaintiffs out of business to aid it in a wider distribution of certain of its chemicals, and whether in fact it would have -- and has -- helped Dow for the plaintiffs to be out of business -- whether Dow did unreasonably offer better credit terms to other customers, or terms of sale to other customers, than to plaintiffs and what type credit risks the plaintiffs were, and what knowledge Dow had of their credit standing -- whether Dow ever ceased selling to plaintiffs completely and/or insisted on selling them in such small amounts as to seriously harm their business. In sum, whether Dow conspired with Pennsylvania Paste to drive the Dovbergs out of business.

I repeat to you that these questions are merely guides, samples of the kind of questions presented by this case, that may assist you in making your determination as to whether there

was any conspiracy here in restraint of trade.

One part of the statute I shall decide for you. I instruct you that should you find a conspiracy in restraint of trade of the sort I have described to you, such conspiracy should be considered one among the several states. In other words, the interstate character of the business involved here need not concern you.[30]

Evidence has been introduced as to the size of the businesses involved in this case. Size of sales may be taken into account by you for such purposes as you consider appropriate. The size of all the businesses here involved may also be taken into account by you in determining reasons for their actions and the responses of others in this case to their actions.

You should note carefully, however, that the mere fact that some of the partnerships or corporations involved in this action are small should not lead you either to favor them or disfavor them because of their size. The fact that some of the other parties involved in this case are large should not lead you either to favor them or disfavor them because of that fact.[31]

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30. United States v. Yellow Cab Co., 332 U.S. 218, 225; Apex Hosiery Co. v. Leader, 310 U.S. 469, 485.
31. 28 F.R.D. 414.

On the basis of the law as I have outlined it to you, you should now be prepared to begin consideration of whether there was a conspiracy here. If you find there was none, you should vote for the defendants, and proceed to consider the second or monopoly count in this case. If you should find a conspiracy as I have described it to you between two or more of the defendants, you must then consider the question of damages. Note, however, that my instructions to you with respect to damages does not indicate and should not be construed by you as an indication that any damages need be awarded. Such instructions are being given because I am required to charge you on all possibilities and all phases of this case which it is possible for you to consider.

Recovery may be had in any Anti-Trust suit for such damages suffered by the plaintiffs to their business or property as a result of defendants' conduct in violation of the Anti-Trust Acts. Damages may only be granted for amounts lost as a result of acts or omissions of the defendants which played a substantial part in actually bringing about such loss as occurred and where the loss was either a direct result or reasonably probable consequence of such acts or omissions. In arriving at any amount of award, you should include such damages suffered by the plaintiffs as a result of lost profits; that is to say, profits which the plaintiffs would have made but for the violation of the Act by the defendants.

If you find that the plaintiffs have in fact suffered damage to their business or property, such as a loss in profits as a result of the illegal conduct of the defendants complained of, then the circumstance that the precise amount of plaintiffs' damages may be difficult to ascertain should not affect plaintiffs' recovery, if you should find as a fact that defendants' wrongdoings have caused the difficulty in determining the precise amount. On the other hand, the plaintiffs may not be awarded remote or purely speculative damages. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.[32]

In arriving at the amount of any loss of profits sustained by plaintiffs, you may consider evidence of past earnings of the plaintiffs in the business and testimony as to projected earnings had they remained in business without the alleged conspiracy taking its toll.

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32. Bigelow v. RKO Radio Pictures, 327 U.S. 251; Richfield Oil Corporation v. Karseal Corp., 9 Cir., 271 F.2d 709; Toulmin, Anti-Trust Laws of the United States, 369 (1949); Wyzanski, Charge to Jury, supra, n.20, at p. 910; Grim, J., Charge to Jury, supra, n. 13, at p. 4122.

Plaintiffs claim that they put substantial sums into the business and that they are entitled to that money in full. They claim their plant was in every material way similar to that of Pennsylvania Paste Company, with all the equipment of Pennsylvania Paste, and more, a broader line of products, and lower labor costs. They ask that you consider Pennsylvania Paste's sales as relevant in determining what theirs would have been. They have, as well, introduced evidence of loans being made to the business by the Dovberg family. Pennsylvania Paste and the other defendants argue that even if you find a conspiracy here in restraint of trade, any compilation of damages would be merely speculative. They claim there are substantial differences in every way between their history of operations and their plants, and that no such comparisons can be fruitfully made.

Mr. Darby has testified for the Dovbergs as an expert in business evaluation. Upon visiting the place of the business and upon accepting, for the purposes of his determination of value, various assumptions read to him in a question by Mr. Monteverde, he stated that projected earnings for a 10-year period of the business, the potential value of the business, was between 75 and 100 thousand dollars.

As you recall, the question was rather lengthy. It first stated various contentions of the plaintiffs as to how much money they had placed in the

business, then asked Mr. Darby to assume -- as the plaintiffs maintain in this case -- that the business had been affected by sales of a "cheaper, less effective competitive wall size eliminator, in a similar package, marketed as 'the same thing as' the plaintiffs' wall size eliminator" and that the plaintiffs had been unable to secure for a similar price the same cellulose base for their cellulose paste which was available to the manufacturers of the principal competing products.

I will repeat to you now what I said to you at the time this testimony was admitted. Mr. Darby's testimony is opinion evidence of the fair market value of the business on the basis of the assumptions contained in the question. If you fail to find the assumptions are true, then the evaluation falls. If, on the other hand, you find the assumptions true, you should consider Mr. Darby's testimony on the same basis as any other testimony, taking into account both the direct examination and cross examination. One basic assumption on which Mr. Darby's opinion was based, for example, was that the plaintiffs' business would produce gross sales of $150,000 a year, a profit of $15,000 before taxes, and $10,000 after taxes. Unless you find that assumption and the others contained in the question to be true, you may disregard Mr. Darby's testimony as to damages.

The decision as to the existence of damages and their amount is yours

to make. But the time range that you may take into account in determining both the existence of a conspiracy and possible damages from it is a limited one. You have heard evidence of events which occurred from 1949 through 1957. I charge you now that all activity which occurred before September 28, 1954, may be considered by you as evidence of and background to a possible conspiracy, but may not be the basis of action upon which the plaintiffs recover. For the plaintiffs to prevail, you must find a conspiracy to have existed after September 28, 1954; and you may only grant damages for losses suffered after that date.[33]

The second charge in this case is against Pennsylvania Paste alone. The statute reads in part that "every person who shall ... attempt to monopolize any part of the trade or commerce among the several states"[35] shall be deemed in violation of the Act.

The Dovbergs' claim here is that Pennsylvania Paste Company violated that section of the law in an attempt to retain its allegedly dominant position in the wet paste business in Philadelphia and for the purpose of monopolizing the wet paste business in the Philadelphia area.

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33. Dovberg v. Dow Chemical Co. D.C.E.D. Pa., 195 F. Supp. 337, 343.

35. Sherman Act, 15 USCA §2.

Before you can adjudge whether the defendants attempted to monopolize or not under the Anti-Trust statute, you must first have some idea of what "monopolize" itself means under the statute. Monopoly power exists where there is power to exclude competition.[36] The use of such power to exclude competition would be a violation of that section of this Act that prohibits monopolization.[37] And the use of substantial -- but incomplete -- monopoly power to destroy threatened competition would be a violation of that part of the Act conserned here.[38] This latter act would be considered an "attempt to monopolize" under the statute. Such attempt to monopolize may not be proved, however, merely by showing that one competitor has in fact been eliminated, by business methods fair or foul. Proof must be submitted of a convincing nature that:

1. Defendant had a specific intent to monopolize.

2. Defendant did some act or acts in furtherance of the intent.

3. Defendant's act or acts and intent together resulted in a dangerous probability that a

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36. American Tobacco Co. v. United States, 328 U.S. 781, 811.
37. United States v. Griffith, 334 U.S. 100.
38. Lorain Journal Co. v. United States, 342 U.S. 143, 154.

monopoly would sooner or later occur.

I wish to examine each one of these three elements with you, and then return once more to the nature of monopoly itself.

By requiring specific intent to monopolize, as an element of the offense charged here, the statute requires the defendant to have acted purposefully with the aim of monopolization in mind.[39] The intent required goes beyond merely intending to act in a certain way towards another business and then acting that way.[40] What is required is the intent to force the competitor out of business for the purpose of achieving a monopoly. The usual way to determine this intent is to look at what the defendant said and at what he did and then to decide if these were done as part of normal, legitimate business conduct.[41] Words of a defendant of his intent to destroy a competitor are not, of themselves, sufficient to prove an intent to monopolize.[42] Nor are acts which

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39. Swift & Co. v. United States, 196 U.S. 374, 396.
40. United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 432.
41. Times-Picayune Publishing Co. v. United States, 346 U.S. 594; United States v. Columbia Steel Co. 3 Cir., 334 U.S. 495, 532-34.
42. Mackey v. Sears, Roebuck & Co., 7 Cir., 237 F.2d 869, 873.

do in fact force a competitor out of business thereby sufficient to prove the requisite intent. For the plaintiffs to prevail, you must find from all evidence submitted to you, subjective intent present on the part of the defendant to monopolize an area of the market.[43]

What "area of market" or "relevant market" is here involved? You must determine this as well, and in doing so two areas of inquiry should be considered by you. First, you should consider the size of Pennsylvania Paste Company and its percentage share of the total market in which it operates, taking into account relevant competitive products. Second, you should consider the structure of the market for such information as that will give you bearing on control over price and competitive opportunity that Pennsylvania Paste Company may have had. Pennsylvania Paste argues that there are other forms of wallpaper paste which it does not make, including both dry wheat paste and cellulose paste, which it claims constitute almost 100% of the relevant wallpaper paste market on a national basis. Plaintiffs, however, argue that the relevant area of the market for you to consider, the relevant wallpaper paste market, includes only wet paste manufacture. It is for you to determine what area of the market is

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43. Report of the President's Committee to Study the Anti-Trust Laws 61 (1955).

here involved. You should note, however, that the entire economic picture in this area, as presented to you by the evidence, must be observed in its totality to enable you to make this preliminary determination as to what part of the market you will even consider.

You will recall that the first requirement that you must be convinced of to find Pennsylvania Paste guilty of the violation here charged was a specific intent to monopolize.

The second requirement was some act itself in furtherance of the intent.[44] An overt act is required.

The third requirement (one often considered a part of the second) -- of a reasonable and dangerous probability that a monopoly will sooner or later occur -- was once phrased this way at the end of a sentence attempting to define what an "attempt to monopolize is:"

> "The phrase attempt to monopolize means the employment of methods, means, and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless

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44. See, Editorial Note, Attempt to Monopolize; Its Elements and Their Definition, 27 Geo. Washington L. Rev. 227, 233 (1958).

approach so close as to create a dangerous probability of it."[45]

In other words, for the defendant to be found a violator of this section of the Act, he must not only intend to monopolize, and act in accordance with that intent, but have the power to bring about an actual danger of monopolization.

Let us examine each one of these requirements in the context of the case before you.

First, intent. The Dovbergs point to alleged statements by Mr. Flanigan of an intent to drive them out of business; they claim Mr. Flanigan intended to do so to increase his control of the wet paste business in the Philadelphia area; they claim his business acts were clearly aimed not at winning customers, not even at weaning customers from the Dovbergs, but at the specific end of driving them out of business. They also make other contentions, to be considered by you as you like, in an attempt to prove the intent of Pennsylvania Paste. Mr. Flanigan and Pennsylvania Paste deny the allegations, deny there was any intent to do anything but to compete vigorously in a highly competitive field, deny that the Dovbergs posed any such threat to them as would even lead them to consider following such a course of action. In short, they deny

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45. American Tobacco Co. v. United States, 328 U.S. 781, 785.

any intent but to pursue normal and legitimate business activities.

Second, some overt act is required to place Pennsylvania Paste in violation of the statute. The Dovbergs allege such things as stealing their butter tubs in which they deliver their paste, using both threats and favors to convince retailers not to do business with them, of copying the Dovberg product Nix-Size. Pennsylvania Paste denies all these allegations, and claims that they never took the tubs, never threatened, never gave favors (except for small Christmas gifts), and did not copy Nix-Size, but merely went to a reputable chemist in an attempt to find a legitimate competing product. Other acts are charged, and all are denied. Here, of course, as throughout the case, you must determine what the facts are.

Third, the dangerous probability of eventual monopolization is required. Here you should consider evidence submitted as to how large and how powerful Pennsylvania Paste is in what I have called the "relevant market" for your consideration. In that respect, you should consider Mr. Flanagan's testimony that Pennsylvania Paste's sales constituted 50% of the wet paste market and 25% of the dry paste market in this area. You should consider as well the instructions given you as to what constitutes a monopoly itself. Note that 100% control of a market is unnecessary

to make it a monopoly.[46] One judge has stated that 90% control of a market was monopolistic, that it was doubtful whether 60% or 64% was, and that 33% definitely was not.[47] Such figures are not binding on you. Industries differ and the power to exclude competition may require less percentage of a market in one field than another. But you should note that the slighter the amount of business Pennsylvania Paste did in the relevant market, the less their power was and consequently the less the likelihood of any monopoly sooner or later occurring.

You should note, too, that the fact that the Dovbergs never were able to make their business a thriving one does not in itself indicate that Pennsylvania Paste did or did not attempt to monopolize the relevant market in the Philadelphia area. The Anti-Trust laws are as violated by the prevention of competition as by its destruction.[48]

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46. U.S. v. duPont de Nemours & Co., D.C.Del., 118 F.Supp. 41, 796; aff'd 351 U.S. 377; "Monopoly power can be distinguished from the normal freedom of business only in degree. Nothing except death is an absolute."
47. L.Hand, United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 424.
48. United States v. Griffith, 334 U.S. 100, 107; United States v. Aluminum Co. of America, supra, n. 46, at p. 428-429.

At the same time, the Acts were not designed to penalize the victor of hardy, yet legal, competition between businesses.[49]

Once again with respect to the time period that may be considered by you in determining violation of the Act and damages, I instruct that you may only look after September 28, 1954, in your determination whether any overt act occurred in the alleged attempt to monopolize and in any determination by you of damages.

As to possible damages, your considerations should be the same as I have described to you in considering the conspiracy count. How much did the plaintiffs lose because of activities of the defendants? In making this determination you should, once again, consider all evidence submitted to you, including such matters as how the plaintiffs would have done had they remained in business; how competent the plaintiffs were as businessmen; how much of a market there would have been for plaintiffs. Once again, I instruct you that damages may not be speculative or conjectural.

I offer one final admonition to you before you begin your deliberations. Jurors, like judges, sometimes have difficulty in a legal case keeping their minds solely on the facts presented to them. It is tempting, sometimes, to

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49. Ibid. at p. 416.

consider the personalities of parties involved, and even of counsel involved. I admonish you to remember that this case is to be decided solely on the facts, as you shall determine them, and solely by virtue of the law as I have instructed you on it.

Counsel in this case have made many objections -- some sustained; some overruled. Their duty is to object when evidence is offered that they consider inadmissible. You should not consider which counsel have fared best at the hands of the Court. A legal case is not a game in which counsel gains points for being sustained and loses them for being overruled. You are not scorers in a game. You are searchers for facts, for truth; and you must confine your considerations to that search.

Your verdict in this case must be unanimous. I advise you to consider first the conspiracy count and to determine if two or more of the defendants are liable in damages as charged. Second, you should then consider the monopoly charge made against Pennsylvania Paste alone and decide if it is liable in damages as charged. You should consider the two charges separately, and you must keep each defendant separate in your mind as you consider the case.

I shall request you to report to me two findings on your part:

First: Do you find against any two

or more of the defendants on the conspiracy count; if so, against which defendants, and for what damages?

Second: Do you find against Pennsylvania Paste on the monopoly count; and if so, for what damages?

I repeat to you that this has indeed been a long case. Undoubtedly some of you are tired, perhaps even a bit impatient to finish up and go home. Yet, as you well know, months of hard work has been put in the case by all parties here in preparing it and presenting it to you. It is important to all concerned. When you are in the jury room, I know that you will consider it solemnly and give it the full attention it deserves.

Swear the bailiff.

At Philadelphia,

March , 1962.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1085.

IKE DOVBERG and MAURICE DOVBERG, Individually and t/a PASTE COMPANY OF AMERICA,
Petitioners,

v.

PENNSYLVANIA PASTE COMPANY; and SAMUEL SCHULTZ, ADA SCHULTZ, MARVIN L. SPIRO and ISADORE KAPLAN, Individually and Trading as SAMUEL SCHULTZ & CO., a partnership,
Respondents.

BRIEF OF SAMUEL SCHULTZ, ADA SCHULTZ, MARVIN L. SPIRO AND ISADORE KAPLAN, INDIVIDUALLY AND TRADING AS SAMUEL SCHULTZ & CO., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI, AND APPENDIX.

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IN THE

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IKE DOVBERG AND MAURICE DOVBERG, INDIVIDUALLY AND T/A PASTE COMPANY OF AMERICA,
Petitioners,

v.

PENNSYLVANIA PASTE COMPANY; AND SAMUEL SCHULTZ, ADA SCHULTZ, MARVIN L. SPIRO AND ISADORE KAPLAN, INDIVIDUALLY AND TRADING AS SAMUEL SCHULTZ & CO., A PARTNERSHIP,
Respondents.[1]

BRIEF FOR RESPONDENT SAMUEL SCHULTZ & CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The trial judge's Order and Direction for Judgment, filed November 7, 1962, which sets forth in detail his reasons for granting judgment under Fed. R. Civ. P. 50(b), was not reported, and was not printed or otherwise reproduced by the petitioners. For the convenience of the Court it is printed at the end of this Brief in Opposition as an Appendix.

The opinion of the Court of Appeals is reported at 353 F. 2d 963.

1. The caption of the case appearing on the Petition for a Writ of Certiorari is inaccurate. Dow Chemical Company was not a party in the Court of Appeals and is not a party in this Court. The only remaining parties respondent are those indicated in the caption herein. However, since Pennsylvania Paste Company was put out of business by the destruction of its credit when judgment was entered against it, Schultz & Co. is actually the only respondent in the case.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 3, 1965. Jurisdiction of this Court is based on 62 Stat. 928, c. 646, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where the evidence discloses only that a retailer ceased to deal with the petitioners, who were manufacturers, and dealt instead, on better terms, with another manufacturer who was in competition with them, did petitioners' evidence of their threats to hold the retailer responsible for harm to them which might arise from his "joining an effort" to hurt their business support an inference that, solely by virtue of such threats, the retailer's cessation of dealings with petitioners was transformed into a conspiracy in violation of Section 1 of the Sherman Act?

2. May the value of a business be shown by the answer to a hypothetical question relating to a theoretical business which assumes a volume of production beyond the capacity of the particular business to create and a market for such a volume which does not exist?

STATUTES INVOLVED.

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U. S. C. § 1, in relevant part provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 4 of the Clayton Act, c. 323, 38 Stat. 731, 15 U. S. C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4B of the Clayton Act, c. 283, 69 Stat. 283, 15 U. S. C. § 15b, provides:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

STATEMENT OF THE CASE.

On September 28, 1958, petitioners brought suit under the Sherman Act, and claimed that Dow Chemical Company and eighteen other defendants, individuals, firms and corporations, had conspired together to put petitioners out of business. As discovery progressed petitioners gradually dropped their claims against all defendants except Dow Chemical Company; Pennsylvania Paste Company; Samuel Schultz, Ada Schultz, Marvin Spiro and Isadore Kaplan, individually and trading as Samuel Schultz & Co.; Reba Spivak, individually and trading as Atlas Wallpaper & Paint Co.; and Samuel Milkis, individually and trading as Empire Wallpaper & Paint Co. The trial judge dismissed the claim against Empire, and the jury exonerated the Dow Chemical Company and Atlas. Only Samuel Schultz & Co. (Schultz) and Pennsylvania Paste Company (Papco) remained, and the verdict was against them alone.

After a painstaking review of the record the trial judge determined that there was no probative evidence linking Schultz conspiratorily with Papco and that, whatever petitioners' competitor Papco may have done, Schultz was not shown to have had any part in it. He accordingly entered judgment for the defendants n.o.v. for the reasons stated in his opinion[2] (3b), but in addition alternatively granted a new trial because of the deliberately false testimony and intentional confusion which characterized the petitioners' case (4b).[3]

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2. The opinion of the trial judge, which was called "Order and Direction for Judgment," was not included in petitioners' appendix nor was it even referred to in the section of the petition entitled "Opinions Below" (Petition, page 2). It has, however, been printed as an appendix to this brief.

3. Cf. pages 31-2 of petitioners' brief where they say:

"There was evidence (N. T. 303, 933-940, 2491, 2582, 4040, 4062) that the Schultz firm, like Papco and other retailers to whom Papco sold Liqui-Size, blatantly represented the product as being Nix-Size, or being the same thing as Nix-Size, when it was resold to the public, but that this practice was not character-

Petitioners offered no evidence of any conversations or meetings between the respondents or of any agreement or understanding indicating a purpose to injure petitioners' business.[4] Each of the respondents categorically denied any such conduct or any purpose to put petitioners out of business, and respondent Schultz, as a retailer, had no possible reason to seek to destroy an alternate source of his own supply for the benefit of another, and competing, manufacturer. Actually the amount of business done by Schultz with petitioners was so small it could only be a matter of complete indifference to Schultz whether petitioners were in business or not.

Petitioners' case is based wholly upon the theory that a violation of section 1 of the Sherman Act may be inferred from the fact that in 1951 Schultz believed that

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istic of those who marketed other products which competed with Nix-Size."

N. T. 303 relates to what Philadelphia Wallpaper Co. did in December, 1950; N. T. 933-40 relates to what the proprietor of the Germantown Wallpaper Company said about Papco on June 28, 1954 and what the proprietor of the Brenner Wallpaper Co. said about Papco on June 11, 1952 and March 11, 1955; N. T. 2491 relates to the wording of the label used by Papco; N. T. 2582 relates to what Papco did. In none of them is there any reference to Schultz. N. T. 4040, if it refers to a man named Levy, relates to what some one told Levy in November, 1956 (N. T. 4035), several months after petitioners had ceased to make Nix-Size (Exs. P-234, P-238). If it refers to a man named Applebaum it relates to what Applebaum did on March 24, 1958 (N. T. 4046), more than a year after petitioners were out of business (N. T. 1155) and when there was no longer any demand for their products (N. T. 1160). In none of the citations was there any reference to any practice of those who marketed other products which competed with Nix-Size.

4. Thus during the course of Dovberg's deposition, a portion of which was read into the record as a part of the evidence offered by Dow, but not transcribed, counsel for the petitioners said (Dep. T. 121) "If you just want to know if they (the respondents) actually met, I think his answer is 'no', and we are frank to admit we don't have any evidence that these people actually met and conspired as such. All we can do is draw our conclusions."

Dovberg himself said: "I am not guessing. I—I feel there is conspiracy."

petitioners' competitor, Papco, had the capacity to put them out of business; that in 1952, after having been told by petitioners that Papco was trying to put them out of business, Schultz stopped buying Nix-Size, a product manufactured by petitioners and, even after being threatened by petitioners if he did so, bought instead a substitute made and sold more cheaply by Papco; and because of events which took place after petitioners stopped manufacturing Nix-Size and after they were out of business.

Schultz, whose major business was the sale of wallpaper, incidentally sold a small amount of allied products such as paste and wall size eliminator, and was a customer, not a competitor, of petitioners. He bought some samples of wet paste from petitioners for $30.40 (N. T. 474-5) in 1950.[5] Thereafter he bought none from either petitioners or Papco (N. T. 3095-6; P. T.[6] B-23) and continued to buy wet paste from Pennock (P. T. B-23) and dry paste from Hoyt (P. T. B-66), both of them being competitors both of petitioners and of Papco. In November, 1951 Schultz told petitioners that Papco could put them out of the wet paste business (N. T. 475-6, 480-1). Petitioners had stopped manufacturing wet paste in the spring of 1951 (N. T. 1045, 1098),[7] but there was no evidence that Schultz knew why or that he had ever had any other connection with petitioners' or Papco's activities in wet paste.

A year later, in March, 1952 Schultz stopped buying Nix-Size, a wall size eliminator made by petitioners, because petitioners were slow in deliveries, made split deliveries, had raised their price above that of a like product made by Papco (P. T. B-35-41,-58,-63, D-115; N. T. 423-4,

5. This was supposed to have made Papco "gunning mad" (N. T. 475), not " 'gunning' for" as state at page 31 of the petition.

6. "P. T." designates the portion of the record contained in the "Partial Transcripts."

7. The petition suggests, page 44, "that the campaign was pressed because petitioners continued to manufacture some *wet* paste." See also Petition, pages 46-7. However, petitioner Maurice Dovberg testified that he "couldn't continue to take those losses" (N. T. 238)

574, 2844-5, 3009), and refused to package it under Schultz's trade name (P. T. B-43, -120) as Papco had agreed to do. Petitioner Maurice Dovberg claims that he then told Schultz on March 13, 1952 that he would hold him responsible if he "did anything in joining an effort, combined, to hurt our business" (N. T. 550). On the same day he wrote a complaining letter to Schultz in which, however, there was no reference to any alleged purpose to put petitioners out of business (Ex. P-106; N. T. 552-4); nor was there in a like letter dated June 29, 1953 (Ex. P-110; N. T. 575-8).

There was no suggestion of a conspiracy or of any agreement or understanding between either of the respondents that led Schultz to stop buying from petitioners and buy instead from Papco, with which he was also in competition in the sale of paste (P. T. B-66). He didn't know (P. T. B-67) and had no possible way of knowing if Papco was selling at a profit or a loss, or if Papco was selling "solely to hurt petitioners" or "solely to destroy petitioners' business;"[8] and there was no evidence that the change was made by Schultz for any other than the purely business reasons of better deliveries, lower price and brand label packaging (N. T. 423-4, 574, 2844-5, 3009, P. T. B-36-41,-58,-63) and petitioners' eccentric behavior (P. T. B-57, E-30).

The only other evidence from which the petitioners suggest that a conspiracy between Schultz and Papco might be inferred is some testimony of events which transpired in 1956, which was the last year that, according to petitioners' Exs. P-56 and P-429, Nix-Size was sold, and events transpiring in 1957 when Nix-Size was no longer being made, and in 1958 when it had been off the market for at

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and discontinued sales of wet paste in 1951 (N. T. 1045); that there "might have been occasions . . . where possibly as an accommodation I might have filled some small orders but we were actually out of the wet paste business . . . since the spring of 1951" (N. T. 1098). Thereafter they sold it only on request "as an accommodation for a while" (N. T. 2427-8).

8. Petition, pages 30 and 39.

least a year. Certain of Dovberg's relatives made sample purchases sometime in June of 1956 (P. T. 4197, 4213, 4355, 4358), in 1957 (P. T. 4173), and in the fall of 1958 (P. T. 3454-6), of which petitioners complain. On March 24, 1958 fifteen stores were visited (P. T. 4046, 4053). Since 1958 was a year after petitioners were completely out of business, and 1957 and June of 1956 were both after petitioners had stopped trying to manufacture Nix-Size, nothing done then could have harmed petitioners or helped to put them out of business. They were already out of business when these events are supposed to have occurred.

Petitioners' bank credit was gone (N. T. 1005-6), they were "on the brink of collapse" (N. T. 446) and hopelessly insolvent in 1955 (P-317), and could not even then accept orders unless they received cash with the order (Plaintiffs' Pretrial Statement of Contentions, p. 12; Exs. P-170, P-175, P-176, P-181, P-184). This continued into 1956 (Exs. P-212, P-219, P-224, P-231, P-232, P-233, P-234, P-238), the last year Nix-Size was sold (Exs. P-56, P-429). Early in 1957 petitioner stopped all pretense of being in business (N. T. 773, 998, 1155).

The volume of business alleged to have been lost by Schultz's conduct is insignificant. The Nix-Size purchased by Schultz from petitioners averaged a little over $100 a month (Exs. P-100, D-278 Schultz). When Schultz bought Papco's product it amounted to about $1200 in 1952 and thereafter averaged slightly over $50 a month (D-278 Schultz). It was these trifling purchases that constitutes petitioners' evidence of injury by the respondents that they claim may be interpreted as indicating a purpose to put them out of business.[9] However, in the autumn of 1952 Schultz was still advertising petitioners' Nix-Size (Ex. P-99, N. T. 562, 564) and while Schultz was supposed to be

9. Petitioners professed to find a like ulterior motive in defendant Atlas' termination of purchases from them in 1953 even though its resultant dealings with its supposed co-conspirator, Papco, amounted to only $32.40 (Ex. D-244—Atlas).

conspiring to put petitioners out of business he was paying their bills immediately upon receipt and substantially before they were due so as to give petitioners the cash they so badly needed (Ex. D-129 Schultz, N. T. 3137-41). This seemed even to petitioners to be an effort on the part of Schultz to help them (N. T. 3142).

Petitioners' contentions cannot be viewed in their true light without some understanding of the nature of petitioners' operations.

The petitioner, Ike Dovberg was a paperhanger without education or business experience. His son, Maurice, finished the eleventh grade but his business experience didn't include manufacturing or having anything to do with running a business (N. T. 1214-39), and his ideas of credit were gained from lending the price of admission to movie patrons where he worked (N. T. 1231-2). In total ignorance of the problems attending running a manufacturing business (N. T. 1593-5) Maurice got a cousin to finance them with $15,000 [10] (N. T. 68-71, 1121-2), bought a small building at 728 S. Marshall Street, Philadelphia, and called it a factory, got some machinery and started to manufacture wall paper paste and Nix-Size, a wall size eliminator. After spending $4,000 for a building (N. T. 78) and $5,000 for sugar (N. T. 2086), in addition to other initial expenditures, they never had enough cash to operate with and were in trouble from the very beginning (N. T. 1024, 2226). They were "in dire need of money" as early as 1951 (N. T. 1804-8, 3454-2, 3454-17), had to borrow even then (N. T. 3454-4, 3454-5, 4171-2, 4201), sought to make all their purchases on credit (N. T. 734-7, 1546-9, 1557, 1586-92, 1627-31, 1747-9, 2246-51; Exs. P-164, P-281, P-281a,

10. It was impossible to determine how much money was ever put in the business because of the inaccurate records kept by petitioners. The ledger, Ex. P-243, did not accurately show the condition of the business. Many loans made to it were never recorded and items were given different values at different times throughout the trial (Ex. P-24, N. T. 118-9, 1121-6, 1130-1, 1141, 1146-7, 1282-97, 1990-1, 2225-6, 3454-4, 3454-5, 4172-2, 4201).

P-289), tried to get credit from their principal supplier, The Dow Chemical Co., in an amount twice their original capital and more than the aggregate of all loans obtained from The Broad Street Trust Co. in four years (N. T. 1830-3; Ex. P-188), but gave bad checks to Dow (N. T. 1024-7, 1808-13) and to their distributor, Hoyt (N. T. 870).

Having no experience in determining costs they had no idea what it actually cost to produce the products they were selling. They didn't even know the nature of their competitors' products (N. T. 603-4, 1437-9, 1520-31, 1537-8, 1919a, 1980, 2140-2, 2214-5, 2266-8, 4675-88) or whether their own costs were prohibitive in competition with other products on the market. They began to lose business as early as 1950 (N. T. 268-9, 1397, 1435), sold at a loss, had "no money" (N. T. 201, 204) and were in financial difficulty in 1952 (Ex. D-Dow 1; N. T. 452-4, 456, 1172-5, 1991-2), pledged themselves to lose money (N. T. 553, 1454-7) and did so consistently (N. T. 1789-94, 1839-40, 1983), cutting their own prices to meet their competitors' irrespective of their economic ability to do so (N. T. 718-20, 728-30, 1018-9, 1456, 1983, 2121-2, 2202-15, 2277-80, 3558-63). They gave their customers unlimited credit (N. T. 1587-92, 3118), but knew nothing of their own capital requirements (N. T. 1593-5, 3558-63). They sold below cost as early as 1952 (Ex. D-Dow 1; N. T. 1352-9, 3558-63) and even said that this was done in an effort to increase their volume in the hope that this would enable them to get credit (N. T. 1091, 4574, 4667).

There was no evidence that they ever made any money from any sales, they kept no production records (N. T. 3242) and did not know how to take a year-end inventory (N. T. 3615). Petitioners' hopeless financial status appears clearly from a series of exhibits (Exs. D-Dow 6 to 77; N. T. 1663-1808). Although they wanted to buy on credit their financial condition was so bad they would not give Dun & Bradstreet any data and refused the numerous requests from their distributor, Hoyt, for financial information after giving him an inaccurate financial statement as of Decem-

ber 31, 1951 (N. T. 887-8, 1598-1604, 1606-9, 1676-80, 1773-4, 1781-3, 2017-8; Exs. D-Dow 6 and 66).

Until 1954 petitioners were able to obtain some modest bank credit from the Broad Street Trust Co. (Ex. P-188; N. T. 907-9, 1005) by giving a false statement of assets, and a small amount from Central-Penn National Bank (Ex. P-189; N. T. 910-3), likewise by giving a false income statement (N. T. 3607-9). When this was withdrawn they borrowed all they could get from other members of the family (N. T. 2225-6) and when this was gone they went out of business, blaming their difficulties on the refusal of Dow and Hoyt to extend them credit (Exs. P-158, P-175, D-Dow 78, 272, 273, 210, and 211; N. T. 879, 880, 957, 961, 983-4, 1007-8, 2121-2, 2194-5, 2200), not on anything Schultz had done. Petitioners' "business was beset with trouble right from the start" (N. T. 2226) and its collapse was inevitable because petitioners were without knowledge of even the most elementary and fundamental principles of business operation. There was no evidence that the petitioners ever did or ever could have run a successful business.

ARGUMENT.

The only question presented in this case is whether the District judge was justified in finding and correctly found that the evidence in the case did not establish a proper basis for a finding of conspiracy under the Sherman Act. The decision of this question turns on the particular facts involved. No general principle is in controversy; the disputed issue relates merely to the application of well settled rules to the circumstances of this particular case. No matter of general importance is involved, nor is a review required in order to secure uniformity of decision. The case is accordingly not one appropriate for review by this Court even if the decision below were wrong. *Houston Oil Co. v. Goodrich,* 245 U. S. 440 (1918); *Rice v. Sioux City Cemetery,* 349 U. S. 70, 74, 79, n. 2 (1955). Actually, however, it was correct.

There Was No Evidence of a Conspiracy.

Essentially, all that petitioners' argument amounts to is that a competitor, Papco, was trying to put them out of business, that Schultz had known a year or two before that Papco had wanted to put petitioners out of the wet paste business and knew that petitioners were claiming that it was trying to put them out of business generally, and accordingly that Schultz was obliged to continue to deal with petitioners to the exclusion of Papco and could not buy from Papco without becoming a conspirator with it. Having threatened to hold Schultz responsible if he presumed to stop buying petitioners' product and bought Papco's product instead, petitioners now claim that the jury should be permitted to find that Schultz's refusal to boycott Papco at petitioners' request constituted evidence of a conspiracy under the Sherman Act to harm petitioners. This in effect is a claim that a customer of a manufacturer who is engaged in a price war with a competitor may buy from the competitor only at the peril of being held a conspirator.

His careful re-reading of the record (1b, 3b) made clear to Judge Leahy that the bulk of the great mass of evidence related to parties who were no longer in the case and that an analysis of the deliberately false and confusing testimony offered by the petitioners (4b) showed that there was no probative evidence supporting petitioners' claim,[11] merely the fanciful suspicions of the proprietors of an unsuccessful business, who were seeking an excuse for their failure other than their own inexperience and poor business judgment.

Nowhere is there any suggestion of when the supposed conspiracy began. All that happened in 1950 was Schultz failing to sell Nix-Size at the fair trade price and in 1951 rebottling Nix-Size and selling it under his own brand name and telling petitioners that Papco could put them out of the wet paste business. All that happened in 1952 was petitioners' threatening Schultz that if he stopped buying from them and bought from Papco instead they would hold him responsible, and Schultz ignoring the threat and buying a cheaper competitive product from Papco because petitioners made slow and split deliveries, had raised their prices, refused to package under Schultz's brand name and behaved in an odd manner. Papco's prices were lower, they used Schultz's brand name and made unit deliveries. However, all that may have occurred in 1950, 1951 and 1952 was more than four years before the suit was brought in 1958. What happened in 1956, 1957 and 1958, while within the statutory period, was all after petitioners had ceased to make Nix-Size. They were for all practical purposes out of business in 1956 (N. T. 1838-9), and in 1957 and 1958 actually so, and thus the events complained of during those years could not possibly have harmed them.

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11. The petition, page 36, states that the trial judge assigned two reasons for his final judgment. Actually there were seven (3b-4b). What petitioner states to be "The second reason" (Petition, page 37) is actually the second and third (3b), and although the quotation is ascribed to "App. 17a" nothing like it appears on that page. Even the dissenting opinion below misstated (16a-17a) the basis for the judgment n.o.v. (3b-4b).

In their argument petitioners emphasize the activities of Papco to which they objected,[12] ignoring the fact that it was a competitor of theirs, selling both paste and a wall size eliminator. However, the efforts to connect Schultz improperly with any of Papco's activities likewise ignores petitioners' inability either to help or to harm Schultz and thus the absence of any possible gain to Schultz from petitioners' disappearance,[13] petitioners' unsatisfactory deliveries and price increases and Papco's willingness to sell at a lower price and under Schultz's brand name. It also ignores, as does the dissenting opinion below, the time when the early events complained of occurred, and the obvious impossibility of events occurring in 1956, 1957 and 1958 having any adverse effect whatever on petitioners.

Petitioners also complain (Petition, pages 54, 55), as does the dissenting opinion (35a), that Judge Leahy changed his mind after the verdict. This he was certainly entitled to do and it became obvious to him that he should when his prolonged study of the record made it possible to relate significant events to one another in their proper chronological sequence. This showed that as of the time the various events complained of by the petitioners took place they could not have been the basis for any legitimate inference of conspiracy. It showed that Schultz had nothing to do with the fuss about wet paste in 1950 and 1951 and that he continued to buy all his wet and dry paste from Pennock and Hoyt, who were competitors of Papco. It showed that any supposed price cutting or rebottling in 1951 was not related in any way to Papco and that in spite of their contentions, petitioners continued to sell to Schultz as if nothing had happened (N. T. 3099-3100). It showed that petitioners claim to have made a case for themselves by telling Schultz that Papco was trying to put them out

12. These were of no interest whatever to Schultz.

13. The statement (Petition, Page 29) that "Samuel Schultz had become disenchanted and angry with petitioners" is pure invention, as is the statement (Petition, page 58) that "Schultz wished to hurt petitioners."

of business and that if Schultz dared to stop buying Nix-Size from petitioners and bought instead from Papco, that would be joining in a conspiracy with Papco to harm petitioners. It showed that the only acts complained of that occurred within four years of the suit were after petitioners had become "unable to meet current orders," [14] had stopped making Nix-Size or had actually closed their business, and therefore that they could not possibly have done petitioners any harm. It showed that the dollar volume of Schultz's business lost by petitioners to Papco averaged slightly over $50 per month. It showed that at the time of their failure petitioners blamed it on their distributor Hoyt and Dow Chemical Company [15] because they had refused to extend petitioners any more credit. It showed that the keystone of petitioners' case was their demand in 1952 that Schultz refuse to buy from Papco (N. T. 550) and their two letters (N. T. 552-4 and 575-8); and that all other complaints relating to Schultz were both secondary and unsubstantial. And it also showed that placing events in their proper relative positions in terms of time and mutual relationships, and so to be able properly to evaluate their significance, had been made most difficult by the studied effort of the petitioners throughout the trial to confuse and deceive (4b, 5b-8b, 9b, 12b).

The false testimony and confusion, that added enormously to the length of the trial and the size of the record, and the time intervals between the receipt of the various bits and pieces of evidence, made it impossible even for the trial judge to unscramble them and put them in proper perspective in the time available to him at the end of the plaintiffs' case (102a). The prolonged and careful analysis that he gave the whole record after the case was over, however, led him inevitably to revise the initial impressions set forth in his interlocutory opinion (37a) and to state his final

14. Plaintiffs' Pretrial Statement of Contentions, p. 12.

15. Indeed Dow was the petitioners' principal target throughout the trial.

conclusions in the order of November 7 (1b). Instead of relying on the record or on Judge Leahy's opinion entering judgment n.o.v., which they failed to print, petitioners base their statements now primarily on Judge Leahy's preliminary and interlocutory review of the evidence, which he was compelled to revise after his final review of the entire record.

There Was No Competent Evidence of Damage.

The only evidence of damage offered by petitioners as a measure of their loss was the testimony of C. H. Darby, an engineer, who was called to give an expert opinion of value. On the basis of the assumptions which he was asked to make by petitioners' counsel (P. T. L-128), and on which he relied exclusively (P. T. L-120-1,-163), he concluded that the petitioners had a business which, at the end of 1954, was worth between $75,000 and $100,000 (P. T. L-70). However, Darby's testimony makes it quite clear that this valuation was not of petitioners' business, The Paste Company of America (P. T. L-100), operated by the Dovbergs (P. T. L-289), but of a purely hypothetical business that had gross annual sales of the product manufactured, whatever it was (P. T. L-136), of $150,000, a gross income before taxes of $15,000 and a net income after taxes of $10,000 (P. T. L-71-2, -103,-106,-206). He merely assumed, because he was asked to do so, that the imagined business made a hypothetical 10% profit (P. T. L-93), but this was wholly unrelated to the petitioners' capacity to produce a like amount (P. T. L-102-3) or to any profit that they had ever made or could ever make.

Darby's opinion of value also presupposed that the business would start right off making $150,000 in the year 1955 (P. T. L-125), but at the same time he admitted that if gross annual sales were only $17,000 instead of $150,000, the business would be worth only the value of its net assets, whatever they were (P. T. L-86-7,-237-8). Actually he conceded that on the financial facts developed by the peti-

tioners' evidence the petitioners' business was insolvent as early as 1950 and continued so (P. T. L-233-236). See also Exs. P-242 and 242A and P. T. L-282.

Petitioners' business never made as much as $17,000 in any year of its existence (Ex. P-56) and in 1954 its gross business amounted to $11,000. The theoretical $150,000 was a gross that petitioners could never have obtained. It was arrived at by assuming a capacity to produce sixty-five gross of pints of Nix-Size a week for fifty-two weeks of every year (P. T. L-51) and to sell the entire production at $48 per gross (P. T. L-54), neither of which assumptions was justified by the record. There was no evidence in the case to suggest that there was a market in which anyone could introduce and sell 65 gross of pints of Nix-Size every week, or even that that much was consumed in the entire United States. The largest amount ever sold by petitioners in a year was $13,028.58 (P-56; N. T. 397) and by its competitor, Papco, $7,332.82 (N. T. 397-8).

Hypothetical questions must be based upon facts appearing in the record. This is true in both state and federal courts: *Kale v. Douthitt,* 274 F. 2d 476, 482, 483 (4th Cir. 1960); *Rennekamp v. Blair,* 375 Pa. 620, 628 (1954). The answer to the hypothetical question which was asked Darby should accordingly not have been allowed (P. T. L-57-69) or should have been stricken (P. T. L-290-1). Darby's opinion is simply meaningless, and since this is all that the petitioners offered to show their measure of damage, and since they conceded that there was nothing else available, the judgment n.o.v. was proper for a reason in addition to those given by the court below. *Flintkote Company v. Lysfjord,* 246 F. 2d 368 (9th Cir. 1957), cert. denied 355 U. S. 835; *Wolf v. National Lead Co.,* 225 F. 2d 427, 430-2 (9th Cir. 1955), cert. denied 350 U. S. 915; *Emich Motors Corp. v. General Motors Corporation,* 181 F. 2d 70, 83-4 (7th Cir. 1950).

CONCLUSION.

Respondent Schultz accordingly submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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March 31, 1966.

RESPONDENTS' APPENDIX.

ORDER AND DIRECTION FOR JUDGMENT

Sur Motions Under FR 50(b) and for a New Trial.

AND NOW, to wit, this 7th day of November, 1962, upon consideration of defendants' [Samuel Schultz & Co. and Pennsylvania Paste Company] motions to vacate and set aside judgment in favor of plaintiff, for judgment notwithstanding the verdict, in accordance with defendants' motions for a directed verdict pursuant to FR 50(b) of the Federal Rules of Civil Procedure, and, in the alternative, for a new trial; and upon consideration of plaintiffs' conditional motion for a new trial as to defendant, Dow Chemical Company, in the event a New Trial is accorded to defendants Pennsylvania Paste Company and Samuel Schultz & Co.; briefs submitted and oral argument had thereon on September 17, 1962, with leave to the parties who so requested to file supplemental and answering briefs, which were actually filed; NOW, upon a careful review and study of the entire record, it APPEARS:

Plaintiffs charged each of five defendants with violations of §§ 1 and 2 of the Sherman Act,[1] and §§ 2, 3 and 4 of the Clayton Act,[2] as amended by the Robinson Patman Act;[3] the trial of this cause commenced on November 28, 1961 and the Jury returned its verdict on March 29, 1962; plaintiffs' case in chief took over 41 trial days, over 5,000 pages of transcript, and in excess of 426 exhibits; and after presentation of plaintiffs' case, motions were made by defendants under FR 50 and FR41(b) of the Federal Rules of Civil Procedure for directed verdicts and dismissal; after full and complete argument by counsel for all parties, said motions were granted as to defendant Empire Wallpaper & Paint Company, and denied as to the other four defendants, the Court filing its Memorandum Opinion with the Clerk of the Court on February 21,

NOTE: Because of the length of the footnotes they have been printed at the end of this order, see page 5b, *infra*.

1962 [the said Opinion consists of 75 typescript pages, discusses the evidence in detail, pointing out "The whole area of plaintiffs' case is pretty thin, but not enough for me to hear the ice cracking"] which noted that the plaintiffs having rested their case in chief it was no time then to weigh and evaluate the disputed evidence because it was not the judge's function in so determining a motion for a directed verdict or for a dismissal; thereafter, defendants' case took over 20 trial days, over 1700 pages of printed transcript, and in excess of 277 exhibits; after rebuttal testimony and the Court's Charge to the Jury (39 typescript pages), the Jury returned its verdict and found defendants Pennsylvania Paste Company and Samuel Schultz & Co. guilty of violations of § 1 of the Sherman Act, but found defendants Dow Chemical Company and Atlas Wallpaper Company not guilty of violation of § 1 of the Sherman Act, and Pennsylvania Paste Company not guilty of the separate charge against it of violation of § 2 of the Sherman Act; $22,000 in damages were awarded as against defendants Pennsylvania Paste Company and Samuel Schultz & Co. for violation of § 1 of the Sherman Act; and subsequently such award was trebled by the Court pursuant to the statute; the motions of the defendants herein, and plaintiffs in support of their conditional motion for a new trial, assign several grounds of alleged errors of law on the part of the Trial Judge in the admission or rejection of evidence, and in the Charge to the Jury; each and every item of alleged error has been critically analyzed and evaluated and after a close review of the testimony, exhibits, the briefs of counsel, the Court concludes there was no prejudicial error in the admission of testimony, rejection of testimony, or manner of submission of the issues in the case to the Jury, or in the Charge of the Court, when taken in full context, for it was an accurate presentation of the law; and, NOW, it FURTHER APPEARS:

As pointed out in the Court's Memorandum Opinion on defendants' motions for directed verdict and for dis-

missal at the close of plaintiffs' case in chief, plaintiffs' case was weak; but now, in evaluating all of the plaintiffs' proofs in juxtaposition to the evidence adduced by defendants and in approaching and evaluating the present motions, the nisi prius Judge is in a position to consider such post verdict motions under FR 50(b) of the Federal Rules of Civil Procedure in the light of *all* the evidence adduced at trial, and he can set the verdict aside, if he thinks it improper, and grant a new trial, or grant judgment notwithstanding the verdict;

And the Court having stated in its Rulings Sur Motions for Directed Verdict and Dismissal that the Motions as to Samuel Schultz & Co. were denied because "evidence has been aduced that Schultz knew of Pennsylvania Paste's illegal aim . . . [and] that Schultz acted in furtherance of it by selling the wall size eliminator purchased from Pennsylvania Paste as being, or being the same thing as, Nix-Size";[4] and the Court having had the additional benefit of hearing all the testimony and re-reading all the evidence, now concludes that:

1. All testimony concerning alleged knowledge of Samuel Schultz & Co. of Pennsylvania Paste's allegedly conspiratorial aim relates to communications between plaintiffs and Samuel Schultz & Co. in or before 1952,[5] and

2. All testimony concerning acts of Samuel Schultz & Co. for 1952-56 period indicates it did nothing more than purchase wall size eliminator from Pennsylvania Paste and end purchases from plaintiffs, and

3. All testimony of alleged sales of Pennsylvania Paste-manufactured wall size eliminator "as being or being the same thing as" plaintiffs' Nix-Size relates to acts in 1956 and 1958,[6] and

4. No evidence has been adduced indicating any plausible or rational motive for Samuel Schultz & Co. to have entered into a conspiracy in the 1952-56 period,

or in any other period alleged by plaintiffs, to force plaintiffs out of business, and

5. No other probative evidence has been introduced linking Samuel Schultz & Co. conspiratorially with Pennsylvania Paste, and

6. Pennsylvania Paste is legally unable to conspire with itself and therefore violate § 1 of the Sherman Act (15 USC § 1),[7] and

7. There has thus been total failure and lack of evidence to prove the essential elements of plaintiffs' case[8] relating to guilt of Samuel Schultz & Co.

AND it further appearing that such substantial portions of the testimony of plaintiff Maurice Dovberg [on the stand over 6 weeks and over 4200 transcript pages] ranged from deliberate obfuscation[9] to deliberate fabrication,[10] and from fantasy[11] to the bizarre,[12] and that said testimony, on the whole, cannot be granted much credence, the Court thus concludes that the jury verdict is against the weight of the credible evidence.

Therefore, it is ORDERED, ADJUDGED and DECREED that motions of Samuel Schultz & Co. and Pennsylvania Paste Company to vacate and set aside the judgment in favor of the plaintiffs for judgment notwithstanding the verdict pursuant to the provisions of FR 50(b) of the Federal Rules of Civil Procedure be and the same are granted; and it is ordered that judgment is hereby granted in favor of said defendants; and it is further

ORDERED, ADJUDGED and DECREED that should the decision herein contained, granting judgment notwithstanding the verdict to defendants, be reversed by an appellate court, this Court alternatively grants defendants' motion for a new trial; and in addition denies plaintiffs' conditional motion for a new trial against defendant, Dow Chemical Company.

PAUL LEAHY,
Senior District Judge.

FOOTNOTES

1. 15 USC §§ 1 and 2.

2. 15 USC §§ 13, 14 and 15.

3. The general nature of this litigation was discussed in the denial of defendants' motions for summary judgment. D. C. E. D. Pa., 195 F. Supp. 337.

4. Rulings, p. 71.

5. For samples, see Tr. pp. 475, 548, 549, 550, 552, 553.

6. Testimony of R. Goldberg, Tr. p. 3454-6; testimony of J. Levy, Tr. p. 4014 through 4016; testimony of R. Applebaum, Tr. p. 4049; testimony of B. J. Dovberg, Tr. p. 4176, 4177; testimony of L. E. Dovberg, Tr. p. 4198; testimony of N. Dovberg, Tr. p. 4215, 4220 through 4226.

7. Union Pacific Coal Co. v. United States, 173 F. 737; Lawlor v. Loewe, 209 F. 721, aff'd 235 U. S. 522; United States v. Reading Co., 183 F. 427, modified on other grounds, 226 U. S. 324; United States v. American Naval Stores Co., 172 F. 455. Cf. Paramount Pictures v. United Motion Picture Theatre Owners, 3 Cir., 93 F. 2d 714.

8. See, Morris Brothers Lumber Co. v. Eakin, (CA 3) 262 F. 2d 259, 263.

9. The following colloquy is selected merely as a sample:

Q. Your closing inventory in 1950 by your return was $630, wasn't it?

A. That's what the accountant showed.

Q. By your return, isn't that right?

A. Yes.

Q. And your testimony as I recall it was that the reason you have $630 there is because that's what your accountant told you to put in; is that right?

A. That's what the accountant put in.

Q. Right. And your opening inventory for 1951 was $630, was it not?

A. Yes.

* * *

Q. What was your closing inventory at the end of 1951 as you estimated it?

A. When I took an actual inventory?

Q. Yes. You said you didn't take an actual inventory, so what was your closing inventory at the end of 1951 as you estimated it?

A. I didn't take an inventory at the end of '51.

Q. What was it as you estimated it?

Footnote 9, continued

A. About the same, or about——
Q. What was it as you estimated it?
A. Let me see that return.
Q. Of course. Take all of them.
A. I would have estimated that my inventory was somewhat less.
Q. What was it as you estimated it, Mr. Dovberg?
A. About——

MR. MONTEVERDE: When you say "estimated," you mean on the income tax returns?

MR. MATZ: No, he gave an estimate. He told us that he had an estimate of his closing figures as of the end of 1951 and I am asking him what it was.

MR. MONTEVERDE: You are talking about 1950?

MR. MATZ: I am talking about 1951.

A. I estimated I had about $500 worth of inventory less than what I had previous.
Q. Would you please tell us what was your estimate of your closing inventory as of the end of 1951?

* * *

Q. I will ask the witness again, what was your closing inventory as you estimated it as of the end of 1951?
A. The over-all inventory as to what it actually was? I did not take an inventory.
Q. I ask you again what did you estimate to be your closing inventory as of the end of 1951.
A. The accountant showed $100.
Q. I ask you again, what did you estimate to be your closing inventory as of the end of 1951?
A. About $500 or so less than what it was the year before.
Q. Will you name the figure?
A. $530.
Q. Would you name the figure that you estimated to be your closing inventory as of the end of 1951?

MR. MONTEVERDE: 1951.

MR. MATZ: That's what I said. I have been saying it for the last ten minutes.
A. $100.

By MR. MATZ:—

Q. Now, you tell us now that you estimated your inventory at the end of 1951 to be $100; is that right?
A. No, I didn't estimate it. The accountant showed $100 because I told him that I estimated that my inventory might be about $500 or so less than what it was the previous year, and so he put $100 down there.

Footnote 9, continued

Q. And so he put $100 down there. And I come back to my question again, what was the inventory that you estimated you had on hand at the end of 1951?

A. I didn't estimate the total inventory that I actually had on hand. I estimated that I had about $500 less than I had the previous year.

Q. Well, how could you do that without knowing what you had on hand?

A. Because that's what I estimated that I had less. I had made purchases during that year.

Q. Will you answer my question?

A. And I had replenished——

MR. MONTEVERDE: Just a moment, please, Mr. Dovberg, we want to get this over promptly and he is entitled to a responsive answer. That can be answered very shortly Now, would you read the question back?

[The question was read.]

A. Then I don't know.

* * *

A. Well, the accountant asked me, "Do you have more or less inventory than——"

By MR. MATZ:

Q. Will you answer my question, please?

A. I didn't——

Q. How would you know that you had about $500 less without checking your inventory?

A. I didn't know but I estimated, sir.

Q. How did you estimate it?

A. Because I felt that I had less inventory by possibly about $500. I knew we had a comparable inventory.

Q. Mr. Dovberg, I have now asked you several times, how did you know you had $500 less at the end of the year?

A. That was an estimate.

Q. How did you arrive at that estimate?

A. The accountant asked me and that's what I said. I said, "We have about $500 less inventory than what we had——"

Q. How did you arrive at that figure of $500?

A. It was just an estimate.

Q. How did you make that estimate? Couldn't it just as well have been $2000 or $200?

A. It could have.

Q. Then why did you make it $500 if it could have been $200 or $2000?

A. That's what I told the accountant and on the basis of that he put down $100.

Q. In other words, you are telling us now this $500 had no basis in fact?

Footnote 9, continued

A. No, I told the accountant that I believed that I had less inventory by about $500.

Q. And now we come back to the question again.

A. And this was—that's what I assumed.

Q. And how did you arrive at that figure of $500?

A. The accountant asked me and that's what I told him.

Q. I didn't ask you how you arrived at telling the accountant; I asked you how you arrived at that figure of $500.

A. I guessed.

* * *

[Tr. pp. 3283-3289]

10. Another example refers to partnership tax returns filed by plaintiffs and utilized by them in making PX 242A (Tr. p. 1103):

Q. Now, I show you your 1951 partnership return. You have already testified that the opening inventory in that return is incorrect, haven't you?

A. Yes.

Q. Is the closing inventory correct?

A. No.

Q. What is wrong with the closing inventory?

A. It is incorrect.

Q. Well, what is wrong with it?

A. I had a much more substantial inventory.

Q. When?

A. I had—in—by the end of 1951.

Q. Did you take inventory at that time?

A. No, I did not.

Q. Then why did you put in $100 as closing inventory if as you now state you had much more inventory?

A. The accountant used that as a figure.

Q. You mean he put the figure in and you had nothing to do with it?

A. The accountant put in that figure. I revealed to him that I had not taken inventory, that my time was too consuming, that it was an enormous job for me to suddenly stop and spend several days just taking inventory to come up with an honest and accurate figure, and I told him that I had not taken inventory and on the basis of that the accountant used $100.

Q. You knew it was more than that?

A. I did.

Q. Did you know how much more?

A. No, I did not.

* * *

Q. So you now state that you knowingly filed an improper return for 1951. Is that right?

A. As far as the inventory is concerned, Mr. Matz, yes.

Q. Both opening and closing. Is that right?

A. Yes.

Footnote 10, continued

Q. Now, let us go to 1952. Look at that one. Is that opening inventory correct?

A. No.

Q. Is the closing inventory correct?

A. No.

Q. Did you know it to be incorrect when you signed that return?

A. Yes.

* * *

Q. Why didn't you tell your attorney that they were incorrect?

MR. MONTEVERDE: Well, I object to that as argumentative and also embodying two questions in one.

THE COURT: Please reframe the question.

MR. MONTEVERDE: I think you should first ask whether he told his attorney.

MR. MATZ: Did he?

MR. MONTEVERDE: He certainly did.

MR. MATZ: At the time they were offered in evidence?

MR. MONTEVERDE: Certainly.

* * *

Q. Did you know they were incorrect when they were offered in evidence?

A. Yes.

Q. When you gave these returns to your attorney, did you tell him they were incorrect?

A. Yes.

Q. When was that?

A. When I gave my attorney the returns.

* * *

Q. Now, do you know what the opening inventory should have been as of January 1, 1953?

A. No, if I do, I would have put it down there, Mr. Matz.

* * *

Q. What is it on there?

A. It says $561.

Q. That was the closing inventory in your tax statement; is that right?

A. That's the figure the accountant used, yes.

Q. Now, where did he get that figure?

A. He just put it down.

Q. You mean he pulled these figures out of the air and then you signed the return?

Footnote 10, continued

A. [redacted], prior to filing the income tax return, I discussed this with my accountant and I explained to him that I had not taken an inventory and that I did not know a figure, an actual figure, for inventory and the accountant said to me, "Well, we will use that figure," and that's what he did.

Q. You mean he just came up out of the air and gave you $561, is that it, as an inventory figure?

A. He seemed to give me the impression that there was nothing wrong, that generally this is done . . .

* * *

[Tr. pp. 3053-3057; 3070-3071]

11. Another example:

Q. Well, now, did you have a party by the name of P. Davis in charge of your research division?

A. I had an associate at one time who came into the factory and worked from my factory, J. Davis.

Q. J. Davis is it?

A. Yes.

Q. And he worked for you?

A. No, he didn't work for me. It was an acquaintance that I had made, and this fellow used to come into the factory and use my office facilities, and I considered him an associate but he had nothing to do with the business.

* * *

Q. Did he ever sign any letters for you as Mr. Monteverde just told you?

A. Yes.

Q. Now, I thought you said he was just an acquaintance of yours, that he had nothing to do with the business.

A. He had nothing to do with the business.

Q. Didn't he transact business for you?

A. You mean as far as signing letters?

* * *

Q. He signed letters for you?

A. Yes.

Q. Why did he sign letters for you?

A. Because I had him sign letters.

Q. Did he write the letters, dictate them?

A. No. I wrote the letters.

Q. You wrote the letters?

A. Yes.

Q. Did you pay him?

A. No.

* * *

Q. When was Mr. Davis associated with your company?

A. From the beginning of the business until the end of the business, Mr. Obert.

Footnote 11, continued

Q. And by the beginning when do you mean?

A. From the very inception of that business until the business ended.

* * *

[Counsel thereupon showed Mr. Dovberg letters from Dovberg's corporation, signed J. Davis, and Mr. Dovberg stated he had signed them himself.]

* * *

Q. Why would you put J. Davis, and why would you sign his name to that letter?

A. Because I was J. Davis.

Q. Who else are you, anybody else so that we know?

A. No. You see, Mr. Obert, I am under oath. You are asking me questions. So, I am telling you J. Davis was associated with me in business from the very inception to the very end, and when I wrote as of J. Davis I sign J. Davis' name if I decided I didn't want to use my name I used J. Davis' name. If there is anything wrong with that you tell me and I am willing to suffer the penalty. I was J. Davis in this instance. . . .

* * *

Q. Did you in the course of your business from 1950 through 1957 use any other name beside J. Davis?

A. Jerome Davis.

Q. You used Jerome Davis?

A. Yes.

Q. You went under that name?

A. Yes.

Q. Why?

A. If I ever wrote a letter and I decided not to use, my name I used Jerome Davis, J. Davis.

Q. Why wouldn't you sign your own name to matters pertaining to your own business, Mr. Dovberg?

A. In instances where I felt that I didn't want to identify myself with the business.

Q. Well, why wouldn't you want to identify yourself with your own business?

A. That is the only thing I can tell you, Mr. Obert. That is the only answer.

* * *

Q. Can you give us any reason why you would have signed that letter J. Davis?

A. No other reason except that I already gave you that if I ever corresponded and I didn't use my name, or decided not to use my name, I signed it J. Davis.

Q. But you can give no more specific reason why you would use another man's name than you have given us that you just decided sometimes you didn't want to use your own name. Is that right?

Footnote 11, continued

A. That's correct.

* * *

Q. Where does J. Davis live?

A. I will retract that statement. There was no J. Davis.

Q. You mean there was no Mr. J. Davis that ever was associated with you?

A. No.

Q. And you told this Court under oath less than ten minutes ago to the contrary?

A. I corrected my statement, and I said that under oath I signed J. Davis.

Q. And didn't you say Mr. J. Davis used to come there and work with you from 1950 through 1956?

A. J. Davis was associated with my business from the inception until the end because I made it so. That is what I said.

Q. You mean J. Davis lives in your mind as a reality?

A. No.

Q. No?

A. No.

* * *

[Tr. pp. 2305-2314]

12. Another example:

Q. I show you Exhibit D-148 that has a similar type of designation after the number. In this instance "L" appears before it and the numeral "66" is typed after it. What does that mean?

A. No significance.

Q. It has no significance at all?

A. No.

Q. Why is it put there if it has no significance?

A. Because I just put it there when I typed the invoice.

Q. Is that like Jerome Davis?

A. Yes, it could have been.

Q. Well now, you told us about Jerome Davis eventually. Why not tell us why you put "66" after the number.

A. It has no significance.

Q. Well, I show you the next one, D-154, and that has "L" before it and "99" after it. Why is that?

A. That has no significance.

Q. And there are numerous invoices here, all containing similar designations; right?

A. Yes.

Q. And they have no significance?

A. Absolutely no significance.

Q. "L" couldn't stand for ledger, could it?

A. No.

Q. Did you have a ledger of your accounts?

A. No.

Footnote 12, continued

Q. Do you swear under oath you never kept a ledger?

A. I swear under oath I never kept a ledger. My uncle's name was Louis.

Q. You swear your uncle's name was Louis? What has that to do with it?

A. My uncle's name was Louis and my uncle had passed away and I preceded the invoice numbers with the letter "L" for Louis.

Q. In memoriam of Louis?

A. Well, yes. Otherwise they had no significance.

Q. Did you memorialize Louis in any other way, so that we know for the purpose of this case?

A. No, not yet.

Q. When had Uncle Louis passed away?

A. By the end of 1951.

Q. When?

A. By the end of 1951.

Q. And you never used the designation "L" to memorialize your uncle before 1951 then; is that your testimony?

A. To the best of my recollection.

Q. Then what were the numbers after? Why did you put the numerals 66 and 99 and so forth after it?

A. They didn't mean a thing.

Q. Well, you first told us the "L" meant nothing. Then you told us the "L"——

A. Well, it had no relationship to this case and so for that matter it would be insignificant, Mr. Obert.

[Tr. pp. 4878-4881.]

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October Term, 1965.

No. 1085.

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Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

The important question presented by the petition for certiorari (pp. 61-66) turns on the propriety of setting aside a jury verdict in petitioners' favor. Critical to a correct determination of that question is the rule, honored by the dissenting opinion of Chief Judge Kalodner, Judge Biggs and Judge Staley, that the evidence must be viewed in the light most favorable to petitioners.

The rule is not difficult of application here. The trial judge analyzed petitioners' evidence in a 75-page opinion filed in connection with his denial of defendant's motion for directed verdict, concluding there that "sufficient factual questions have been presented by plaintiff to allow the jury to rule on the issues" as to Papco (19a) and that "substantial evidence has been introduced" in support of plaintiffs' charges against Schultz (33a). Chief Judge Kalodner's dissenting opinion sets forth a summary of the evidence

which, again, applies the proper rule for evaluating the trial judge's abrupt reversal of position after verdict.

It is this final reversal of position, without more, that the brief in opposition here stresses. The action of the trial judge is described as having been taken "after a painstaking review of the record" (page 4), after "careful rereading of the record" (page 13), after "prolonged study of the record" (page 15). In fact, the trial judge's reasons for entering judgment n.o.v. after a four month trial cover one printed page.[1] And there is no basis whatsoever for suggesting that this page represented study in addition to that which formed the basis for the 75-page opinion which accompanied the denial of the motion for a directed verdict.

Actually, the brief in opposition seeks to support its "careful re-reading" test by improper use of the trial judge's comments with respect to the credibility of Maurice Dovberg. Those comments were made by the trial judge in connection with the alternative ruling on the motion for a new trial. Petitioners showed in the court below, and would be prepared to show here if the occasion were proper, that there was no substance to these charges against Maurice Dovberg, made after submission of the case to the jury. Neither the majority or the dissenting opinion in the court below made reference to this aspect of the case. *A fortiori,* this aspect of the trial judge's decision cannot be converted into support for the ruling on the motion for judgment n.o.v. And there is no justification, on the question of the judgment n.o.v., for repeated references to "deliberately false testimony and intentional confusion which characterized the petitioners' case" (page 4), "deliberately false and confusing testimony offered by petitioners" (page 13), "the studied effort of the petitioners throughout the trial to

1. The trial judge's reasoning in entering judgment is succinctly stated in the dissenting opinion in the Court of Appeals (16a-17a) printed in the appendix to our petition. We did not print the entire order and direction for judgment because almost all of it is devoted to justifying the trial judge's alternative order for a new trial, a ruling which this Court has not been asked to review at this time.

confuse and deceive" (page 15), and "false testimony and confusion that added enormously to the length of the trial and the size of the record" (page 15).

The controlling standard here is that presented in the petition and at the opening of this reply—taking the evidence in the light most favorable to petitioners. Only on this basis can it be determined whether the jury verdict should have been set aside. However, petitioners can not let pass, without comment, the factual misstatements and incomplete statements made in the brief in opposition as to the proof on which the jury based its verdict.

To illustrate, the brief in opposition states (p. 13): "* * * Nowhere is there any suggestion of when the supposed conspiracy began." Under the evidence, the jury was entitled to find that Schultz became a conspirator with Papco when, sometime around March 13, 1952, Schultz stopped purchasing Nix-Size; commenced purchasing Papco's inferior product, Liqui-Size; arranged to have Liqui-Size marketed in a package identical to Nix-Size (for the obvious purpose of passing off one product as a privately branded edition of the other), and took such action with knowledge that Papco's product was being marketed in this manner solely in an effort to destroy petitioners' business (App., pp. 24a-28a).

Again, the brief in opposition presents as uncontroverted the reasons given by Schultz for its actions toward petitioners even though such reasons were denied by Dovberg (N. T. 540-541, 556-557), the Schultz testimony was inconsistent on the point (Petition for Certiorari, pp. 33-35), and Schultz's own evidence showed it was acting contrary to its own economic interests in its dealings with petitioners (App., 28a).

The brief in opposition states (pp. 8-9): "* * * while Schultz was supposed to be conspiring to put petitioners out of business, he was paying their bills immediately upon receipt * * *." The evidence shows that Schultz paid its bills "immediately" on only one occasion, and that on most

occasions it paid promply in order to obtain a 2% discount (N. T. 3231-3241). Furthermore, there was no evidence that Schultz had conspired with Papco prior to March of 1952, and the evidence showed that in March, 1952, the Schultz firm was months late paying for deliveries of Nix-Size but, nevertheless, took the discount when it paid (N. T. 3240-3241).

The brief in opposition states (p. 15): "* * * (The record) showed that the only acts complained of that occurred within four years of the suit were after petitioners had become unable to meet current orders, had stopped making Nix-Size, or had actually closed their business, and therefore, that they could not possibly have done petitioners any harm." This suit was filed in September, 1958, and while the brief in opposition persists (pp. 5, 7, 8, and 13) in asserting that 1956 was the last year in which Nix-Size was sold, the evidence showed that petitioners sold Nix-Size until sometime in 1957 (N. T. 1011). The evidence also showed that all times in September, 1954 and thereafter petitioners owned their plant, equipment and truck free and clear of all encumbrances (N. T. 74-78, 83, 119, 826, 873, 1040-1041, 4570); that they had products which they were able to sell at a substantial profit in free and open competition (N. T. 266-267, 407-413, 488-489, 1051-1053, 1056-1057, 1068, 1151-1153, P-396, 4570, 447-452, 717-719, 1072-1081); that they had a national distributor (N. T. 55-66, 122-182, 1590-1591) and credit with their suppliers (other than Dow) and with two banks (N. T. 857, 907-913, P-188, P-189) and that the potential of their business as of September 1954 was between $75,000 and $100,000 (Darby Tr., L40, L50-57, L70-73, L126-127). The evidence, summarized in the dissenting opinion in the Court of Appeals, also showed that, prior to and after September, 1954 with knowledge of Papco's campaign to injure petitioners, Schultz knowingly cooperated with Papco by refusing to deal with Nix-Size and selling Liqui-Size in a deceptively similar package even when Schultz's own experience showed that such sales were contrary to its economic interest. There

was also express evidence[2] that in 1956, 1957, and even 1958 Schultz passed off its product as Nix-Size or the same thing as Nix-Size in all of its stores (App., 27a) but the jury was entitled to infer that this practice was not a recent one, since Schultz had selected the packaging which made this possible in the spring of 1952.

The brief in opposition presents the position, as though the evidence could justify no other, that petitioners failed in business as the result of ignorance and incompetence. Quite obviously, this presentation is wrong. The trial judge's ruling on the motion for a directed verdict, his charge, the jury verdict, the opinions below, all demonstrate that the evidence could be viewed as supporting the contrary conclusion. And the "facts" to which respondents refer in support of this view are taken out of context or incompletely stated.

Thus, the brief in opposition states (p. 9): "* * * Maurice got a cousin to finance him with $15,000 * * *, bought a small building * * * and called it a factory, got some machinery and started to manufacture. After spending $4,000 for a building and $5,000 for sugar, in addition to his other initial expenditures, he never had enough cash to operate with * * *."

This description ignores testimony that the Dovbergs also invested funds and assets of their own funds in the business (N. T. 100-108, 115, 1267-68, 2060, 2067-68), that months were spent in remodeling their factory building (N. T. 73-76), that the equipment purchased was new and the full equivalent of Papco's, and that at the end of 1950 (N. T. 76-78, 401-04), petitioners had a factory, equipment, a delivery truck and substantial quantities of raw materials and packaging, all fully paid for, and credit with their then suppliers (N. T. 857, 2068-71, 2081-82).

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2. While the source of such testimony should not be relevant with the case in its present posture, the fact is that contrary to the implication in the brief in opposition (p. 8), such testimony did not emanate solely from members of petitioners' family (Part. Tr. 4008-4016, 4040-4062).

The brief in opposition (pp. 7-10) gives an incomplete and inaccurate picture of petitioners' credit position. Maurice Dovberg's testimony showed that petitioners obtained and repaid a series of loans with two banks, with whom they still had credit in 1954 (Exhibits P-188-189, N. T. 907-13); that they also had credit with suppliers other than Dow—including their national distributor—after 1954 (N. T. 868-71), and that a few bad checks which they had after 1954, when their problems worsened, were made good promptly (N. T. 870, 913, 1024-26).

As the brief in opposition states (p. 10), Maurice Dovberg did try "* * * to get credit from the Dow Chemical Company in an amount twice his original capital and more than the aggregate of all loans obtained from the Broad Street Trust Co. in four years." This took place in 1956 and 1957, when petitioners' situation had become so desperate by reason of Dow's discriminatory policies and actions of Papco and others that petitioners' only hope of salvation was to obtain methocel at the carload rate on credit in order to fill profitably their then outstanding orders for Calico paste (N. T. 998-99, 1007-08). However, prior to 1956, at a time when petitioners had a national distributor and owned their factory and equipment free and clear, petitioners needed no more from Dow than a supply of the same type of methocel that Dow made available to petitioners' competitors, and the privilege of procuring such supplies at the prices and in the shipment sizes available to their competitors, to cover which shipments, costing $2,000 or less, plaintiffs then had adequate banking credit (N. T. 873-878, 976-77, 2146-48).

The brief in opposition (p. 10) also charges that Maurice Dovberg "* * * had no idea what it actually cost him to produce the products he was selling * * *" and "* * * there was no evidence that he ever made any money from any of his sales * * *." Actually, petitioners' evidence, consisting of schedules based on production formulae and invoices establishing the cost of ingredients and packaging,

established that, prior to difficulties stemming from the activities of the various defendants, petitioners, following a pricing formula slightly more conservative than that of Papco, sold their products profitably both locally and through their national distributor (N. T. 266-68, 407-13, 1051-57, 1149-53; P-168, P-396, Flanagan Tr., Feb. 26, 128).

The brief in opposition, carrying on the same charge that petitioners destroyed themselves, states (pp. 10-11) that petitioners gave unlimited credit, knew nothing of their own capital requirements, could not take year end inventory, and refused to give credit information. There is no need to continue to discuss these charges in detail. There is evidence of record on which a jury could find to the contrary. Thus, the Dovbergs gave as much as 90 days' credit in slow seasons but their biggest customer paid promptly, and their line of credit permitted them to do this. Maurice Dovberg only testified to his difficulty in computing his 1950 year end inventory. Months after that date Dovberg gave more information to Dun & Bradstreet than did Papco, the principal competitor (N. T. 1600; Dovberg Tr., Feb. 14, L-298, L-314). The Broad Street Trust Company produced Dun & Bradstreet reports on petitioners which showed petitioners paid most of their creditors promptly as late as 1955 (Zuecca Tr., Mar. 12-13, 27-32; P-453A-453F). Dovberg gave Hoyt financial statements on three occasions (N. T. 1676-1680, 2015-2016, 2175) and Hoyt knew that petitioners honored their bills (N. T. 887-888, 1605-1606, 2017-2018) and continued to ship on credit (N. T. 2175-2200; P-172, P-173). The Broad Street Trust officer, called as a witness by Schultz, concluded his cross-examination by saying of Maurice Dovberg: "I would say he was an honest man" (Zuecca Tr., Mar. 12-13, 44-51).

The brief in opposition urges that petitioners failed to prove damages, an argument not adopted in either court below. In connection with this argument, petitioners' expert witness, C. H. Darby, is described as "an engineer". Mr. Darby was in fact graduated from Princeton's School of Engineering. In addition, he is a fully qualified expert

in the evaluation of business, and the Eastern District Manager of the nationally known firm of Marshall and Stevens (N. T. Flanagan-Darby Tr., L-6-12, L-31-32).

Mr. Darby testified on the basis of a hypothetical question. Copies of this question were submitted to the four defense counsel at the time Darby testified, and each and every fact which the witness was asked to assume was documented at the time by a reference to the daily transcript and exhibits already in evidence (Flanagan-Dovberg, Tr., L-20-21, L-31-39). The trial judge gave defense counsel an opportunity to establish any respect in which the record did not support the assumptions, and they failed to do so, either during or after the trial.

CONCLUSION.

Accurately and fairly summarized, the record in this case provided support for the jury verdict. The opinion of the dissenting judges in the court below makes the point well. The brief in opposition, in urging affirmance, can do no more than attempt to argue facts. And each such attempt, as this reply illustrates, must fail since, for every factual assertion made in the brief in opposition, there is evidence of record to the contrary. The jury verdict should have been permitted to stand.

For the reasons set forth in the petition for certiorari and herein, the petition should be granted.

Respectfully submitted,

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